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2704
No. 13039

United States
Court of Appeals
for the Ninth Circuit.

see v. 2705

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, and EUGENE J. O'RILEY, as Trustee in Bankruptcy of the Estate of UNITED PRODUCE COMPANY, a Corporation, Bankrupt,

Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellee.

Transcript of Record
In Three Volumes
Volume I
(Pages 1 to 432)

Appeals from the United States District Court,
Northern District of California,
Southern Division.

FILED

NOV 14 1951

No. 13039

United States
Court of Appeals
for the Ninth Circuit.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Banking
Association, and EUGENE J. O'RILEY,
as Trustee in Bankruptcy of the Estate of
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Bankrupt,

Appellants,

vs.

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CAGO, a National Banking Association,

Appellee.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, for the
Northern District of California, Southern Division

No. 28721R

MERCHANDISE NATIONAL BANK OF CHI-
CAGO, a National Banking Association,

Plaintiff,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Bank-
ing Association,

Defendant.

COMPLAINT

Plaintiff Merchandise National Bank of Chicago complains of defendant Bank of America National Trust and Savings Association and alleges a claim for relief as follows:

I.

At all times herein mentioned plaintiff Merchandise National Bank of Chicago was and is a national banking association organized and existing under the laws of the United States, located in the State of Illinois, and having its principal place of business in Chicago, Illinois.

II.

At all times herein mentioned defendant Bank of America National Trust and Savings Association was and is a national banking association organized and existing under the laws of the United States,

located in the State of California, with its head office and principal place of business in San Francisco, California, in the Northern District of California wherein it resides and is doing business.

III.

Within the meaning of Section 1348 of Title 28, United States Code, at all times herein mentioned the plaintiff was and is a citizen of the State of Illinois, and defendant was and is a citizen of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000).

IV.

At all times herein mentioned the plaintiff has had and now has a deposit account with the defendant with a credit balance in plaintiff's favor, and defendant has owed and now owes the amount of said balance to the plaintiff. On or about November 23, 1948, and at all times thereafter until February 18, 1949, the said credit balance was in the amount of \$296,451.97. On or about November 23, 1948, plaintiff made demand upon defendant to pay to plaintiff the entire amount of said credit balance, but the defendant refused and failed to pay to the plaintiff any part thereof, except that on February 18, 1949, after repeated demands, the defendant paid to the plaintiff the sum of \$183,235.47, but defendant has failed and refused and still fails and refuses to pay to the plaintiff any other sum.

V.

In the premises the defendant is indebted to the plaintiff for interest at the legal rate, to wit, 7% per annum, on the sum of \$183,235.47 from November 23, 1948, to and including February 18, 1949, being the sum of \$3,069.50; and defendant is further indebted to the plaintiff in the sum of \$113,216.50 plus interest thereon at the legal rate from November 23, 1948, until paid.

Wherefore, plaintiff prays judgment against defendant for the sum of \$116,286.00, together with interest at the rate of 7% per annum on \$113,216.50 from November 23, 1948, until paid, and on \$3,069.50 from February 18, 1949, until paid, for its costs of suit herein incurred and for such other and further relief as may be meet and proper in the premises.

/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

[Endorsed]: Filed March 22, 1949.

[Title of District Court and Cause.]

ORDER REQUIRING PERSONS TO BE
JOINED AS PARTY DEFENDANTS TO
RESPOND TO COMPLAINT AND TO IN-
TERPLEADER COUNTERCLAIM

Bank of America National Trust and Savings Association, defendant in the above-entitled action, hereinafter referred to as "Bank of America," has moved this court ex parte for an order requiring persons not now parties to this action to be joined as party defendants to respond to the complaint of Merchandise National Bank of Chicago, plaintiff in said action, and to the interpleader counterclaim contained in the answer which said Bank of America, contemporaneously with the making of this order, is to file in this action. Said interpleader counterclaim alleges, that conflicting claims are being made by Eugene J. O'Riley, as trustee of the estate of United Produce Company, a bankrupt; Cy Mouradick, Frank C. Lofendo and plaintiff to a balance of \$30,920.36, which during the last part of 1948 stood on the books of Bank of America to the credit of Frank C. Lofendo. Said interpleader counterclaim prays that Eugene J. O'Riley, as such trustee; Cy Mouradick and Frank C. Lofendo be made parties defendant in this action to respond to the complaint of plaintiff and said counterclaim.

Good cause appearing therefor, it is hereby Ordered that Eugene J. O'Riley, as such trustee; Cy Mouradick and Frank C. Lofendo, are hereby brought into this action as parties defendant to

respond to said complaint and said interpleader counterclaim and that the clerk of this court issue a summons to Eugene J. O'Riley, as such trustee; Cy Mouradick and Frank C. Lofendo summoning and requiring them to answer said complaint and said interpleader counterclaim.

Done in Open Court this 24th day of June, 1949.

/s/ MICHAEL J. ROCHE,
Judge.

[Endorsed]: Filed June 24, 1949.

[Title of District Court and Cause.]

**ANSWER OF FRANK C. LOFENDO, TO THE
COUNTERCLAIM OF THE DEFENDANT,
BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION**

Now comes Frank C. Lofendo, a defendant in the interpleader by counterclaim of the Bank of America National Trust and Savings Association, a national bank association, and for answer to the said counterclaim, says:

That he disclaims any interest and title to, and waives any interest and title to, the balance of \$30,920.36 on deposit with the Bank of America National Trust and Savings Association and standing to the credit of Frank C. Lofendo in his account with the said bank, at the close of business on November 19, 1948.

/s/ FRANK C. LOFENDO,
Attorney Pro Se.

State of Illinois,
County of Cook—ss.

I, Alvin D. Simon, a Notary Public in and for the County of Cook and State of Illinois, do hereby certify that Frank C. Lofendo, personally known to me to be the person who signed the foregoing Answer, appeared before me this First day of August, A.D. 1949, and acknowledged under oath, administered by me, that he signed the foregoing Answer as his true and voluntary act and for the purposes therein set forth.

/s/ ALVIN D. SIMON,
Notary Public.

My Commission Expires 11/22/50.

[Endorsed]: Filed August 3, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO DEFENDANT'S
COUNTERCLAIMS

Plaintiff Merchandise National Bank of Chicago replies to the defendant's counterclaims as follows:

Reply to First Counterclaim, Otherwise Denominated "First, Separate and Distinct Defense"

I.

Plaintiff admits the allegations of paragraph I.

II.

Answering the allegations of paragraph II, plaintiff admits, alleges, and denies as follows:

Admits and alleges that on November 13, 1948, and for several months prior thereto it had an account with defendant and continued to have that account thereafter; alleges that defendant has never paid to plaintiff the full balance in said account although demand has been made as alleged in the complaint; admits that on or about February 18, 1949, defendant sent to plaintiff, and that on February 24, 1949, plaintiff received, a check for \$183,235.47 but alleges that the balance still due after payment thereof was \$113,216.50 plus interest;

Admits that during the existence of the account, when defendant collected a check sent to it by plaintiff for collection, defendant would credit the account with the amount of the check, alleges that if defendant was unable to make collection it customarily reversed the credit, admits and alleges that when defendant sent plaintiff a check drawn on plaintiff for payment, defendant would debit the account with the amount of the check only upon receipt from the plaintiff of written authorization to do so in the form of an outstanding and unrevoked credit memorandum or advice of credit;

Denies each and every allegation of said paragraph II not hereinabove expressly admitted or alleged.

III.

Answering the allegations of paragraph III, plaintiff admits, alleges, and denies as follows:

Admits and alleges that on November 19, 1948, and for several months prior to that date there was a deposit account with defendant at its East Bakers-

field branch maintained in the name of Frank C. Lofendo, hereinafter referred to as "Lofendo"; alleges that said account was in fact an account of United Produce Company although maintained in the name of Lofendo, and will hereafter be referred to in this answer as the "Lofendo account" for convenience only;

Admits that on November 13, 1948, six checks aggregating \$113,216.50 drawn by United Produce Company on plaintiff and payable to the name of Lofendo were delivered to defendant at its East Bakersfield branch for collection and that defendant accepted them for collection; in this connection alleges that the six checks were delivered to defendant by United Produce Company which itself endorsed the name of Lofendo thereon and that United Produce Company was both maker, in its own name, and payee, in the name of Lofendo;

Alleges that defendant did not credit the Lofendo account with the amount of the six checks or any part thereof but merely received them as agent for collection and acquired no right, title or interest in them, either at that time or at any other time;

Admits that on November 13, 1948, defendant at its East Bakersfield branch mailed the six checks to plaintiff; denies that they were sent to plaintiff for payment and alleges that they were sent to it for collection;

Admits that the plaintiff received the six checks during business hours on November 15, 1948; admits and alleges that on November 15, 1948, a clerk in plaintiff's employ did the following: (1) entered

a debit against the account of United Produce Company with the plaintiff in the amount of the six checks; (2) mailed to defendant an "advice of credit" to the effect that the six checks had been collected; (3) entered a credit on its own books to defendant in the amount of the checks; and (4) marked the six checks "paid"; alleges, in this connection, that each of these acts was done by mistake, that in fact the account of United Produce Company was without sufficient funds to pay the checks or any part of them, that in fact the checks were not collected and were not paid, and that the six checks were drawn by United Produce Company to the order of Lofendo in order to cheat and defraud the plaintiff.

Alleges further that the "advice of credit" was not received by defendant until November 19th, and that meanwhile, on November 17th, plaintiff discovered the mistake in debiting the account of United Produce Company, in crediting the defendant's account, in sending out the advice of credit, and in marking the checks paid; that thereupon, on November 17th, plaintiff did the following things: (1) it endorsed on each check the statement that it had been cancelled in error; (2) it reversed the debit entries in the account of United Produce Company; (3) it reversed the credit entries in the account of defendant; (4) it telephoned to the defendant and informed the latter that the advice of credit had been sent out by mistake, that the checks had not in fact been collected or paid, and that the advice of credit was rescinded and revoked; alleges

that defendant thereupon, on November 17th, agreed with plaintiff not to act upon the advice of credit when received.

Alleges further that at the time of this telephone conversation defendant had not yet received the advice of credit and did not yet know that the account of United Produce Company had been debited or that its account on the books of the plaintiff had been credited or that the checks had been marked paid or that an advice of credit had been sent out.

Alleges further that on the next day, November 18th, an officer of the plaintiff, fully empowered to act for it, arrived in San Francisco and in person advised the defendant that the six checks had not been collected and that the advice of credit had been sent out by mistake and was rescinded and revoked; that plaintiff rescinded the authority to defendant to charge plaintiff's account in reliance on the advice of credit when received, and defendant thereupon, on November 18th, again agreed to the said revocation and rescission and agreed that the six checks should be returned to it by plaintiff and that defendant would not act upon the advice of credit when received.

Alleges that at the time just mentioned the defendant had not yet received the advice of credit and did not yet know that United Produce Company's account with plaintiff had been debited or its own account with plaintiff credited or that the checks had been marked paid, nor had defendant yet given any credit for any part of said six checks to the Lofendo account or in any way taken any ac-

tion whatever in reliance on any advice of credit or in reliance on the supposed collection or payment of the checks, nor had it acquired any right, title or interest in said checks or their proceeds or any part thereof, and it never did so.

Alleges that pursuant to the agreement of November 18th, plaintiff on November 19th returned to the defendant the six checks and advised that they were unpaid.

Admits and alleges that late on November 19, 1948, despite the rescission and revocation of the advice of credit and contrary to its agreement, defendant debited plaintiff's account with the amount of the six checks, namely, the sum of \$113,216.50 and contemporaneously credited the Lofendo account with the same amount.

In this connection plaintiff further alleges as follows: As early as October 22, 1948, the defendant became suspicious that the Lofendo account at its East Bakersfield branch was being maintained and operated as part of a check kiting operation with United Produce Company, and on that day it gave instructions to its employees that thereafter they were not to accept for immediate credit any checks of United Produce Company drawn to the order of Lofendo and tendered to defendant for deposit in the Lofendo account but were to take any and all such checks for collection only, were to give credit only when collected, and were not to permit Lofendo to draw against any items until collection. These instructions were repeated on November 15, 1948. On that day there was a balance in the said Lofendo

account of \$13,061.17, and there was then, on that day, presented to defendant at its East Bakersfield branch for deposit to the Lofendo account five checks totalling \$97,207.00 drawn by United Produce Company to the order of Lofendo. Contrary to its own instructions defendant negligently and carelessly entered an immediate credit to the Lofendo account in the sum of \$97,207.00 and immediately on November 15th honored checks drawn on the said account and paid out funds against said credit in the amount of \$109,569.15 although the checks for \$97,207.00 had not yet been collected. But for said credit entry of \$97,207.00, the credit balance in the Lofendo account would have been insufficient by \$86,507.98 to pay the checks drawn on the account. Late on November 18, 1948, defendant was advised by its correspondent in Chicago, Illinois, that the five checks for \$97,207.00 had no funds behind them and were being returned uncollected. Defendant then found itself in the position of having sustained a loss of \$82,296.14 by reason of having negligently and carelessly given the Lofendo account credit for the five checks for \$97,207.00 and in having permitted the credit to be drawn against before collection of the checks. In order to retrieve this loss defendant desired to find some way of entering a credit in the Lofendo account in an amount sufficient to make up the over-draft so as to permit itself to charge back against the Lofendo account said \$97,207.00. Consequently, on November 19th the defendant conceived the unconscionable scheme of crediting Lofendo's account

with the sum \$113,216.50 and to this end of charging the account of the plaintiff in the same amount. Thereupon it did charge the account of the plaintiff with the sum of \$113,216.50, credit the account of Lofendo with the same amount, and simultaneously charge the Lofendo account with the sum of \$97,207.00.

Relative to the allegation in paragraph III of the First Counterclaim that "plaintiff is contending in this action that it had the right to revoke said payment by it of said six checks and that therefore it has the right to recover in this action from defendants the sum of \$113,216.50," plaintiff denies that there ever was payment of said six checks or any of them and alleges that the acts of marking the checks paid, crediting the account of defendant and debiting the account of United Produce Company on its own books, and sending out an advice of credit were merely clerical acts done by mistake, and that the first three acts were never called to the defendant's attention. Plaintiff does contend that it had a right to correct the mistake and revoke and rescind the advice of credit, and it alleges that defendant agreed to the rescission and revocation. Plaintiff further contends and alleges that if its acts were to be construed as constituting payment, then it had a right to revoke the payment, that defendant never acted in reliance on the alleged payment, that defendant never had any right, title or interest in any of said checks or any alleged proceeds thereof, that Lofendo and United Produce Company were and are guilty of attempted fraud

on the plaintiff in the premises and never had any rights against plaintiff in said checks or alleged payment thereof, and that defendant could never have greater rights therein than Lofendo or United Produce Company.

Denies each and every allegation of paragraph III not expressly admitted or alleged above.

IV.

Plaintiff admits the allegations of paragraph IV.

V.

Answering the allegations of paragraph V, plaintiff denies that in a kiting operation the bank referred to in said paragraph V as the second bank may not give the kiter's agent credit or permit drawing against the checks deposited with it until collected; admits all other allegations of paragraph V, but alleges that if the bank in which the kiter's agent deposits checks drawn to his order by the kiter does not give the agent credit before the funds represented thereby are collected, the kiter cannot carry on his kiting operations.

VI.

Answering the allegations of paragraph VI, plaintiff admits and alleges that the plaintiff refused payment of the five checks totalling \$97,207.00 for lack of funds in the drawer's account to pay them and further alleges that defendant did not credit the Lofendo account with \$113,216.50 until after it learned that payment had been refused on the checks for \$97,207.00.

VII.

Answering the allegations of paragraph VII, plaintiff admits, denies, and alleges as follows:

Admits that "United Produce Company and Lofendo by carrying on said check kiting were in substance and effect falsely and fraudulently representing to defendant that all of the last-mentioned checks represented bona fide payments arising out of actual transactions, whereas said checks did not represent bona fide payments in actual transactions but were fictitious," but in this connection plaintiff alleges that United Produce Company and Lofendo by carrying on said check kiting were in substance and effect falsely and fraudulently making the same representation to the plaintiff and that they did so in order to induce plaintiff to extend credit to United Produce Company.

Denies that, in paying checks drawn by Lofendo payable to the order of United Produce Company or in crediting to the account of Lofendo checks drawn by United Produce Company payable to Lofendo, defendant relied on said or any representations or believed them to be true; alleges, in this connection, that in paying checks drawn by Lofendo payable to the order of United Produce Company and in crediting to the account of Lofendo checks drawn by United Produce payable to him defendant acted negligently and carelessly as alleged in paragraph III of this Answer.

Alleges further that defendant had no right to credit the \$113,216.50, or any part thereof, to Lofendo's account; admits that if defendant had not credited Lofendo's account with said \$113,216.50,

the Lofendo account would have shown an over-draft of \$82,296.14.

Denies each and every allegation of paragraph VII not hereinabove expressly admitted or alleged.

VIII.

Denies each and every allegation of paragraph VIII.

Reply to Second Counterclaim, Otherwise Denominated "Second, Separate and Distinct Defense"

I.

Answering paragraph I whereby defendant adopts by reference certain allegations of its first counter-claim, plaintiff adopts by reference its answers to said allegations.

II.

Denies each and every allegation of the second counterclaim not expressly admitted above.

Reply to Interpleader Counterclaim

I.

Answering paragraphs I, II, IV and IX whereby defendant adopts by reference certain allegations of its first counterclaim, plaintiff adopts by reference its answer to said allegations.

II.

Admits the allegations of paragraph III.

III.

Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph V that "Eugene J. O'Riley, as such trustee, by virtue of said order and the

execution and delivery to him of the last-mentioned check claims the whole of said balance of \$30,920.36," mut admits all other allegations of paragraph V.

IV.

Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph VI.

V.

Answering the allegations of paragraph VII, plaintiff denies that Lofendo may or does claim that he is entitled to said balance of \$30,920.36, or any part of it; denies that the six checks referred to in paragraph VII were ever paid; alleges that in the event plaintiff is awarded judgment against defendant as prayed in the complaint plaintiff claims no interest in any balance in the said Lofendo account, but in the event that for any reason whatever it should be held that plaintiff is not entitled to judgment as prayed in the complaint then plaintiff does claim said balance.

Wherefore, plaintiff prays that defendant take nothing by reason of its counterclaims, and that plaintiff have judgment as prayed in the complaint.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 21, 1949.

[Title of District Court and Cause.]

ANSWER OF INTERPLEADED DEFENDANT
TO PLAINTIFF'S COMPLAINT AND RE-
PLY TO DEFENDANT'S INTERPLEADER
COUNTERCLAIM

Comes now the interpleaded defendant above named, and by way of answer to plaintiff's complaint herein, and by way of reply to defendant's interpleader counterclaim herein, admits, denies and alleges as follows:

Answer to Plaintiff's Complaint

I.

Admits the allegations contained in paragraphs I, II and III thereof.

II.

Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs IV and V thereof.

Reply to Defendant's Counterclaim

I.

Replying to paragraph I thereof, alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except that he admits the allegations therein adopted by reference to paragraph I of the

first separate and distinct defense of defendant's answer.

II.

Admits the allegations of paragraphs II, III, IV and V thereof.

III.

Replying to paragraphs VI, VII, VIII and IX thereof, alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except that he admits that defendant Bank of America National Trust and Savings Association has no claim upon the said balance of \$30,920.36 and is ready and willing to deposit the same in this court, and admits that he is a citizen and resident of the State of Illinois.

Wherefore, this interpleaded defendant prays:

(1) That defendant Bank of America National Trust and Savings Association be ordered forthwith to deposit in this court the said balance of \$30,920.36.

(2) That this court render its judgment and decree that the said Eugene J. O'Riley, as trustee in bankruptcy of United Produce Company, a corporation, is the owner and entitled to the possession of the said balance of \$30,920.36, and that neither said defendant, nor the alleged claimants named in said interpleader counterclaim, to wit: plaintiff, Frank C. Lofendo, and Cy Mouradick, nor any of

them, have any right, title or interest in or to the same.

/s/ MARTIN LALOR
CRIMMINS, JR.,

CRIMMINS, KENT, DRAPER &
BRADLEY,

Attorneys for Interpledaded Defendant Eugene J.
O'Riley, as Trustee in Bankruptcy of United
Produce Company, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed March 22, 1950.

[Title of District Court and Cause.]

ANSWER OF CY MOURADICK TO PLAINTIFF'S COMPLAINT AND TO DEFENDANT'S INTERPLEADER COUNTER-CLAIM

Comes now the defendant in interpleader counter-claim, Cy Mouradick, and answering plaintiff's complaint and the defendant's interpleader counter-claim, and admits, denies and alleges as follows, to wit:

Answer to Complaint

I.

Admits the allegations of Paragraphs I, II and III of said complaint.

Answering the allegations of Paragraph IV in said complaint contained, this defendant alleges that he has no information or belief sufficient to permit him to answer the allegations of said paragraph IV and basing his denial upon such lack of information and belief, denies each, all, every and singular the allegations of said Paragraph IV.

III.

Answering the allegations of Paragraph V in said complaint contained, this defendant alleges that he has no information or belief sufficient to permit him to answer the allegations of said Paragraph V and basing his denial upon such lack of information and belief, denies each, all, every and singular the allegations of said Paragraph IV.

Answer to Interpleader Counterclaim

Answering the allegations of the interpleader counterclaim, Cy Mouradick admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I of the first, separate and distinct defense incorporated by reference in said interpleader counterclaim and answering the allegations of Paragraph II of the first, separate and distinct defense incorporated by reference in said interpleader counterclaim, alleges that he has no information or belief sufficient to permit him to answer the allegations of said paragraph II incorporated by reference and basing his

denial upon such lack of information and belief, denies, each, all, every and singular the allegations of Paragraph II of the first, separate and distinct defense incorporated by reference in said interpleader counterclaim.

II.

Answering the allegations of Paragraph II of the interpleader counterclaim, admits the allegations of Paragraph III of the first, separate and distinct defense incorporated therein by reference.

III.

Answering the allegations of Paragraph III of the interpleader counterclaim, alleges that he has no information or belief sufficient to permit him to answer the allegations of said Paragraph III, and basing his denial upon such lack of information and belief, denies each, all, every and singular the allegations of said Paragraph III.

IV.

Answering the allegations of Paragraph IV of said interpleader counterclaim, and the allegations of Paragraph VI of the first, separate and distinct defense incorporated therein by reference, admits, that the balance in the account of said Lofendo on November 19, 1948, was the sum of \$30,934.76, and further answering the remaining allegations thereof, this defendant alleges that he has no information or belief sufficient to permit him to answer the remaining allegations, and basing his denial upon such lack of information and belief, denies each,

all, every and singular the allegations of said Paragraph IV not herein specifically admitted to be true.

V.

Answering the allegations of Paragraph IV, alleges that he has no information or belief sufficient to permit him to answer the allegations of said Paragraph IV, and basing his denial upon such lack of information and belief, denies each, all, every and singular the allegations of said Paragraph IV.

VI.

Admits the allegations of Paragraph VI.

VII.

Answering the allegations of Paragraph VII, this defendant alleges that he has no information or beliefs sufficient to permit him to answer the allegations of said Paragraph VII, and basing his denial upon such lack of information and belief, denies each, all, every and singular the allegations of said Paragraph VII.

VIII.

Admits the allegations of Paragraph VIII.

IX.

Answering the allegations of Paragraph IX, this defendant admits, the allegations thereof, except the allegation that Eugene J. O'Riley and Frank C. Lofendo will voluntarily appear in this action and subject themselves to the jurisdiction of this court and in this connection, this defendant alleges he has

no information or belief sufficient to permit him to answer said allegation and basing his denial upon such lack of information and belief, denies said allegation.

Wherefore, Cy Mouradick prays that the plaintiff take nothing by its complaint on file herein; that it be ordered, adjudged and decreed by the court that this defendant, Cy Mouradick, has a valid and first lien on said bank account of the said Frank C. Lofendo with the defendant, Bank of America National Trust and Savings Association, and for such other and further relief as to the court may seem meet and proper in the premises.

MACK & BIANCO,

By /s/ [Indistinguishable.]

Attorneys for Cy Mouradick.

State of California,
County of Kern—ss.

Cy Mouradick, being first duly sworn, deposes and says:

That he is the answering defendant named in the foregoing Answer of Cy Mouradick to Plaintiff's Complaint and to Defendant's Interpleader Counter-claim; that he has read the same and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ CY MOURADICK.

Subscribed and sworn to before me this 5th day
of May, 1950.

[Seal] /s/ FAYE B. BALCH,
Notary Public in and for the County of Kern,
State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1950.

[Title of District Court and Cause.]

AMENDED ANSWER AND COUNTERCLAIM

Now comes Bank of America National Trust and Savings Association, the defendant in the above-entitled action, and by leave of court first had and obtained files its amended answer to the complaint of the plaintiff on file herein, and admits, denies and alleges as follows:

I.

Defendant admits the averments of paragraphs I, II and III of said complaint.

II.

Defendant denies each and every, all and singular, the averments of paragraphs IV and V of said complaint, except that defendant expressly admits the averments of the last-mentioned paragraphs to the following extent, and only to the following extent, namely: that on or about November 23rd,

1948, and at all times thereafter until on or about February 18, 1949, plaintiff had a deposit account with defendant with credit balances therein in favor of plaintiff; that as of the close of business on November 23, 1948, the balance to the credit of plaintiff in said account was the sum of \$183,530.01; that from November 23, 1948, to December 16, 1948, the balances to the credit of plaintiff in said account varied from time to time; that during the last-mentioned period the lowest balance in said account to the credit of plaintiff was the balance of \$179,167.57 to its credit at the close of business on November 29, 1948; that during the last-mentioned period the highest balance in said account to the credit of plaintiff was said balance of \$183,530.01 to its credit at the close of business on November 23, 1948; that at the close of business on December 16, 1948, the balance in said account to the credit of plaintiff was \$183,235.47; that during the period from December 16, 1948, to February 18, 1949, the balance in said account to the credit of plaintiff continued to be said \$183,235.47; that on the last-mentioned date defendant paid said \$183,235.47 to plaintiff and thus closed said account; that on or about November 23, 1948, it was agreed between plaintiff and defendant that plaintiff would cease to send to defendant checks drawn on defendant and on other banks in California for collection and for the crediting of the proceeds thereof to said account and that defendant would cease sending to plaintiff checks drawn on plaintiff, the proceeds of which would be debited to said account, and that

in this way, after the items then in transit had been received, collected and credited or debited as the case might be to said account, the balance therein to the credit of plaintiff would be fixed at a figure that thereafter would not change; that on December 4th, 1948, the firm of Brobeck, Phleger & Harrison, as the attorneys for plaintiff, delivered defendant a letter, dated December 3, 1948, a copy of which is attached hereto, marked Exhibit "A," and is hereby referred to and made a part hereof; that at the same time that Brobeck, Phleger & Harrison delivered defendant the last-mentioned letter, they delivered to it a letter, dated December 1, 1948, written by plaintiff to defendant, a copy of which is attached hereto and marked Exhibit "B," and is hereby referred to and made a part hereof; that when Brobeck, Phleger & Harrison delivered to defendant the last-mentioned letter, the balance to the credit of plaintiff in said account was not the sum demanded by plaintiff by the last-mentioned letter, that is the sum of \$290,659.04, but was the sum of \$181,528.95; that plaintiff mailed defendant another letter, dated December 8, 1948, a copy of which is attached hereto and marked Exhibit "C," and is hereby referred to and made a part hereof; that defendant received the last-mentioned letter on or about December 10, 1948; that on December 10, 1948, and for more than a month prior thereto, plaintiff had in its possession travelers checks issued by defendant in a sum exceeding \$114,400.00; that plaintiff held said travelers checks under an agreement between it and

defendant under which plaintiff had the right to sell the same and remit the proceeds of such sales to defendant after deducting therefrom a commission on such sales; that on or about December 21st, 1948, defendant informed Brobeck, Phleger & Harrison that when plaintiff had delivered to it the travelers checks of defendant then in the possession of plaintiff, defendant would pay to plaintiff the amount which according to defendant's contention was to the credit of plaintiff in said account; that on or about January 24, 1949, defendant received from plaintiff the travelers checks of defendant in the possession of plaintiff, which such travelers checks amounted to the sum of \$114,400.00; and that thereafter and on or about February 18, 1949, defendant paid to plaintiff the balance then standing to the credit of plaintiff in the said account, namely, said sum of \$183,235.47.

As a First, Separate and Distinct Defense and as a Counterclaim, defendant alleges as follows:

I.

At all times herein mentioned plaintiff, Merchandise National Bank of Chicago, was and is a national banking association organized and existing under the laws of the United States, located in the State of Illinois, and having its principal place of business in Chicago, Illinois. At all times herein mentioned defendant, Bank of America National Trust and Savings Association, was and is a national banking association organized and existing

under the laws of the United States, having its principal place of business and head office in San Francisco, California, and doing a banking business throughout California by means of offices located in the various cities and towns in the State of California.

II.

On November 13th, 1948, and for several months prior thereto plaintiff had an account with defendant, which will be referred to hereafter as "plaintiff's account." Plaintiff continued to have its said account with defendant until February 18th, 1949, when defendant sent plaintiff a check for the balance then in its said account, namely, \$183,235.47, and thereby closed said account. While said plaintiff's account was in existence, defendant would credit said account with amounts becoming due by it to plaintiff and would debit said account with amounts due by plaintiff to it. For example, while said plaintiff's account was in existence, when defendant collected a check sent it by plaintiff for collection, defendant would credit said account with the amount of such check and when defendant sent plaintiff a check drawn on plaintiff for payment, defendant upon such check being paid would debit said account with the amount of such payment.

III.

On November 19th, 1948, and for several months prior to that date, Frank C. Lofendo, hereinafter referred to as "Lofendo," had a deposit account with defendant. On November 13th, 1948, Lofendo

delivered to defendant and defendant accepted from Lofendo for collection six checks, hereinafter referred to as "said six checks," aggregating \$113,-216.50, drawn by United Produce Company on plaintiff and payable to Lofendo. On November 13th, 1948, defendant mailed said six checks to plaintiff for payment. Defendant is informed and believes and therefore alleges that plaintiff received said six checks during business hours on November 15th, 1948, and that plaintiff on November 15th, 1948, did the following: (i) it debited the account of United Produce Company with plaintiff with the amount of said six checks, (ii) it mailed defendant what is known in the banking business as "an advice of credit" to the effect that said six checks had been paid, (iii) it credited the defendant on its books in the amount of said checks, namely, in the amount of \$113,216.50, and (iv) it marked said six checks "paid." Plaintiff did not on November 16th, or 17th, 1948, return said six checks to defendant with a notice that they were unpaid, nor did plaintiff on either of the last-mentioned dates give defendant notice that said six checks had been dishonored. On November 19th, 1948, defendant debited said plaintiff's account with the amount of said six checks, namely, with said sum of \$113,216.50, and on the same day it credited said account of Lofendo with said amount. After November 17th, 1948, plaintiff attempted to revoke said payment of said six checks. Plaintiff is contending in this action that it had the right to revoke said payment by it of said six checks and that

therefore it has the right to recover in this action from defendant said \$113,216.50; whereas, defendant is contending in this action that plaintiff did not have the right to revoke said payment and that therefore plaintiff has no right to recover from it in this action said sum. But defendant also contends that if plaintiff has the right to revoke said payment of said six checks, it nevertheless has not the right to recover said \$113,216.50 from defendant because of the facts averred in the succeeding paragraphs of this defense and counterclaim and also in the second separate defense and counterclaim and in the third separate defense of this answer.

IV.

Defendant is informed and believes and therefore alleges that on November 15th, 1948, and for more than five months prior to that date, United Produce Company was a corporation with its principal place of business in Chicago, Illinois, engaged in the business of a commission merchant, that is in the business of buying wholesale vegetables, fruits and other produce and selling such produce to wholesale and retail distributors; that for a period of at least five months prior to November 19th, 1948, Lofendo was an agent of the United Produce Company employed by it to purchase from producers for its account vegetables, fruits and other produce; and that for a period, which will be referred to hereafter as "said period," commencing on July 1, 1948, and continuing to November 17, 1948, United Produce Company was engaged

in what is known in the banking business as kiting checks and was using Lofendo in order to engage in that practice.

V.

The practice of kiting checks, in which, as just stated, United Produce and Lofendo were engaged during said period, can be described as follows: Lofendo, as the agent and tool of United Produce Company, would draw a check upon the East Bakersfield Branch of defendant, which branch will be referred to hereinafter as "said branch," and would deliver such check to United Produce Company so that United Produce Company could deposit said check to its account with plaintiff. Plaintiff upon the deposit of such check with it would credit the account of United Produce Company with plaintiff with the amount of such check. Contemporaneously, United Produce Company would draw a check payable to Lofendo on its account with plaintiff and would cause such check to be deposited to the credit of Lofendo in said account of Lofendo with said branch within such time so that when such check of Lofendo drawn to the order of United Produce Company was presented to said branch for payment, there would be funds to his credit in said branch to pay it. One side of said kiting operation was the side in which checks of Lofendo drawn to the order of United Produce Company, like the check of Lofendo just mentioned, were deposited to the credit of United Produce Company in its said account with plaintiff; and the other side of said kiting

operation was the side in which checks of United Produce Company drawn to the order of Lofendo, like the check of United Produce Company just mentioned, were deposited to the credit of Lofendo in his said account with defendant. In said kiting operation many checks during said period were used on both sides thereof, that is many checks drawn by Lofendo on his account with said branch to the order of United Produce Company were deposited in and credited to the account of United Produce Company with plaintiff and many checks drawn by United Produce Company on its account with the plaintiff to the order of Lofendo were deposited in and credited to the account of Lofendo with said branch, except that towards the end of said period defendant, with the exception of the checks for \$97,207.00 referred to in the next succeeding paragraph, did not on deposit with it of checks drawn by United Produce Company to the order of Lofendo credit Lofendo with the amount thereof, but accepted such checks for collection and did not credit the proceeds thereof to the credit of Lofendo until notified by plaintiff that such checks had been paid. The checks used on both sides of said kiting operation did not represent payments in actual transactions but were fictitious, and United Produce Company and Lofendo engaged in said kiting operation so that the former would obtain thereby credits to its account with plaintiff which it could use to make actual payments.

VI.

At the close of business on November 8th, 1948, said account of Lofendo with defendant showed a credit balance of \$239,120.17. On November 10th, 1948, checks aggregating \$226,059.00 drawn by Lofendo against said account were presented to defendant for payment and were paid by defendant from said account, leaving a balance therein as of the close of business on November 10, 1948, of \$13,061.17. All the last-mentioned checks, except one for \$16,822.00, were payable to United Produce Company. On November 15th, 1948, Lofendo deposited in his said account with defendant checks aggregating \$97,207.00, all of which were drawn by United Produce Company on plaintiff and were payable to Lofendo, and defendant thereupon gave Lofendo credit for said \$97,207.00 and as about to be alleged permitted Lofendo to draw against said \$97,207.00 before defendant had collected the proceeds of said checks from plaintiff. When said balance of \$13,061.17 was added to said \$97,207.00, there was to the credit of Lofendo in said account on November 15th, 1948, an aggregate amount of \$110,268.17. On November 15th, 1948, checks aggregating \$109,569.15 drawn by Lofendo against said account payable to United Produce Company were presented to defendant for payment and were paid by defendant from said account, leaving a balance therein as of the close of business on November 15th, 1948, of \$699.02. On November 17th, 1948, defendant received a letter from plaintiff to the effect that four checks aggregating \$89,813.10,

theretofore deposited by Lofendo with defendant drawn by United Produce Company on plaintiff and payable to the order of Lofendo had been paid upon their presentation to plaintiff for payment and thereupon defendant on November 17th, 1948, credited said account of Lofendo with said sum of \$89,813.10. On November 17th, 1948, checks aggregating \$75,586.86 drawn by Lofendo against said account were paid by defendant from said account, leaving a balance therein as of the close of business on November 17th, 1948, of \$14,925.26. All of the last-mentioned checks were payable to United Produce Company, except one for \$23,724.50. On November 19th, 1948, said six checks aggregating \$113,216.50 were credited to said account of Lofendo with defendant, thus raising the balance in said account to \$128,141.76 (said \$113,216.50 plus said balance of \$14,925.26). Said checks aggregating \$97,207.00, for which defendant gave Lofendo credit on November 15th, 1948, were presented to plaintiff for payment on November 18th, 1948, and plaintiff thereupon refused payment thereof. Defendant was informed on November 18th, 1948, that plaintiff had refused payment of said checks aggregating \$97,207.00; and on November 19th, 1948, defendant, after being so informed, caused Lofendo's account with it to be debited with the amount of said checks aggregating \$97,207.00, thus reducing the balance in said account as of the close of business on November 19th, 1948, from said sum of \$128,141.76 to \$30,934.76. Since November 19th, 1948, no checks drawn by Lofendo against said account have been

paid. On December 23, 1948, defendant charged \$14.40 against said balance of \$30,934.76 to reimburse defendant for its cost in protesting said checks aggregating \$97,207.00, payment of which had been refused as aforesaid, thus reducing said balance to \$30,920.36. All of said checks referred to in this paragraph which were drawn by Lofendo payable to the order of United Produce Company and all of said checks referred to in this paragraph which were drawn by United Produce Company payable to Lofendo were drawn by Lofendo and United Produce Company, respectively, as part of said check kiting in which they were then engaged.

VII.

United Produce Company and Lofendo by carrying on said check kiting were in substance and effect falsely and fraudulently representing to defendant that all of the last-mentioned checks represented bona fide payments arising out of actual transactions, whereas said checks did not represent bona fide payments in actual transactions, but were fictitious. United Produce Company and Lofendo made said representations to defendant to induce it to extend credit to Lofendo in the amount of all the last-mentioned checks payable to Lofendo and drawn by United Produce Company and to induce it to pay all of the last-mentioned checks drawn by Lofendo payable to the order of United Produce Company. Defendant in paying those of the last-mentioned checks drawn by Lofendo payable to the order of United Produce Company and

in crediting to the said account of Lofendo those of the last-mentioned checks drawn by United Produce Company payable to Lofendo relied on said representations believing them to be true. If plaintiff had the right to revoke payment of said six checks aggregating said \$113,216.50, then defendant would not have had the right to credit said \$113,216.50 to Lofendo's account with the result that said account of Lofendo with defendant, instead of showing said credit balance of \$30,920.36, would have shown an overdraft by Lofendo of \$82,296.14. In such case such an overdraft of \$82,296.14 would have been an extension of credit in that amount by defendant to Lofendo which defendant would have been induced to make to Lofendo by said fraud of Lofendo and United Produce Company in making said false representations to defendant; and so in such case defendant would have been damaged by said fraud of Lofendo and United Produce Company in the amount of such overdraft.

VIII.

The continued existence of said kiting operation depended upon United Produce Company maintaining sufficient credits to its account with plaintiff to meet upon their presentation the checks drawn by United Produce Company to the order of Lofendo and deposited in said branch. At all times during a period of at least four months prior to November 19, 1948, plaintiff, in violation of Section 84, Title 12, U.S.C., allowed United Produce Company to incur obligations to it, not falling within

the exceptions enumerated by said section to the limitation prescribed thereby, which obligations were in excess of 10% of the amount of plaintiff's capital stock actually paid in and unimpaired plus its unimpaired surplus funds. Said obligations which plaintiff allowed United Produce Company to incur to it in violation of said section took the form of loans made by plaintiff to United Produce Company, the discounting by plaintiff of drafts drawn by United Produce Company on others and the creation in said account of United Produce Company with plaintiff of overdrafts arising out of the fact that plaintiff was permitting United Produce Company to draw on credits created by checks payable to the order of United Produce Company and deposited to its credit in its said account with plaintiff, including all said checks of Lofendo, prior to the collection of the funds represented by said checks. If plaintiff had not permitted United Produce Company to incur obligations to it in excess of those allowed by said section, United Produce Company and Lofendo could not have carried on said kiting operation during said period because on many occasions during said period if plaintiff had not permitted United Produce Company to incur obligations to it in excess of those allowed by said section there would not have been credits to the account of United Produce Company with plaintiff against which the checks drawn by United Produce Company to the order of Lofendo could have been paid, and if said credits to the account of United Produce

Company with plaintiff had not been created in said manner said kiting operation would have collapsed long prior to November, 1948, and said six checks which constituted part of said kiting operation could never have been drawn and neither plaintiff nor defendant could have suffered any loss because of said six checks. In the event plaintiff had the right to revoke said payment of said six checks said violation by plaintiff of said Section 84 for the reasons stated in this paragraph proximately caused said damage in said sum of \$82,296.14 which defendant in that event will have sustained and therefore plaintiff in that event is liable to defendant in the last-mentioned sum. And plaintiff is estopped to claim that it had the right to revoke the payment of said six checks and that it did revoke the payment thereof (i) because said loss of \$82,296.14 which defendant will suffer in the event payment of said six checks is revoked will be due to said kiting operation, and (ii) because as stated said kiting operation could not have been carried on if plaintiff had not in violation of said Section 84 permitted United Produce Company to incur obligations to it in excess of the limitation prescribed by that section.

As a Second Separate and Distinct Defense and as a Counterclaim, defendant alleges as follows:

I.

Defendant hereby refers to paragraphs I, II, III, IV, V, VI, VII and VIII of its first separate and

distinct defense and by this reference hereby makes the last-mentioned paragraphs a part of this, its second separate and distinct defense, in the same manner and with the same effect as though said paragraphs were set forth here at length.

II.

Defendant is informed and believes and therefore alleges that defendant acquired knowledge that Lofendo and United Produce Company were carrying on said kiting operation about October 1, 1948. Defendant alleges that if plaintiff did not acquire actual knowledge of said kiting operation about October 1, 1948, then during the period commencing about July 1st, 1948, and continuing down to November 17, 1948, plaintiff by the exercise of reasonable care in the conduct of its banking operations could have discovered that said kiting operation was going on and that continuously during said period plaintiff negligently failed to discover that said kiting operation was going on. Plaintiff did not in order to put a stop to said check kiting advise defendant by telegraph or any other means that United Produce Company and Lofendo were engaged in said check kiting and that therefore defendant should not pay checks drawn on defendant by Lofendo payable to United Produce Company and that it should not give Lofendo credit for checks drawn by United Produce Company on plaintiff payable to Lofendo, except that on November 17, 1948, plaintiff advised defendant that it had just discovered that it would suffer a heavy

loss because of a fraud that United Produce Company had perpetrated on plaintiff. Plaintiff not only did not advise defendant that United Produce Company and Lofendo were engaged in check kiting, but on the contrary on October 20, 1948, it represented to defendant that the practice of United Produce Company was to maintain with plaintiff balances averaging in satisfactory five-figure proportions; and that plaintiff found that United Produce Company was making proper use of a line of credit of \$200,000 being extended to it by plaintiff. Said representations so made by plaintiff to defendant were false. Neither on October 20, 1948, nor for several months prior to that day was United Produce Company maintaining with plaintiff balances averaging in satisfactory five-figure proportions, but on the contrary on October 20, 1948, and for several months prior to that date United Produce Company was maintaining with plaintiff credit balances which were not at all satisfactory because the only reason said account did not show almost constantly substantial overdrafts was that plaintiff was crediting to the account of United Produce Company checks, including said checks of Lofendo, and was permitting United Produce Company to draw against such credits before such checks were collected. And on October 20, 1948, and for several months prior to that date, United Produce Company was not making proper use of said line of credit which plaintiff was extending to it, but was using a substantial part of said line of credit to create credits in its

account with plaintiff so that said kiting operation could be carried on as aforesaid. Plaintiff either knew that said representations were false or plaintiff made said representations without any reasonable grounds for believing said representations to be true. Plaintiff made said representations to defendant to induce defendant to continue to pay checks drawn on defendant by Lofendo payable to the order of United Produce Company and to induce defendant to continue to give Lofendo credit for checks drawn by United Produce Company on plaintiff payable to Lofendo and defendant in continuing to pay such checks of Lofendo and in continuing to give Lofendo credit for such checks of United Produce Company relied on said representations. If plaintiff on about October 1, 1948, when it, according to the information and belief of defendant acquired knowledge that said check kiting was going on, had put a stop to said check kiting, said six checks which constituted a part of said check kiting could never have been drawn and neither plaintiff nor defendant could have suffered any loss because of said six checks. As heretofore alleged, plaintiff during the period from July 1, 1948, to November 17, 1948, negligently failed to discover said check kiting and negligently permitted said check kiting to continue. If plaintiff about October 1, 1948, did not have knowledge of said check kiting, then plaintiff by the exercise of reasonable care could have discovered said check kiting about that date and prior thereto; and if plaintiff by the exercise of such care had so dis-

covered said check kiting and had thereupon stopped it, said six checks which constituted part of said check kiting would never have been drawn and neither plaintiff nor defendant could have suffered any loss because of said six checks. If as defendant is informed and believes, plaintiff about October 1, 1948, had knowledge of said check kiting and did not put a stop to it, plaintiff from that time to November 17, 1948, when said check kiting came to an end was in effect participating in said fraud perpetrated on defendant by United Produce Company and Lofendo. Plaintiff by negligently failing to discover and to put a stop to said kiting operation became liable to defendant for any damages which defendant may suffer by reason of said fraud perpetrated on defendant by United Produce Company and Lofendo. By reason of the facts alleged in this separate and distinct defense and counterclaim, plaintiff, if it had a right to revoke the payment of said six checks, is liable to defendant in said sum of \$82,296.14; and by reason of the facts alleged in this separate and distinct defense and counterclaim, plaintiff is estopped to assert that it had the right to revoke or did revoke the payment of said six checks.

As a Third Separate and Distinct Defense defendant alleges as follows:

I.

Defendant hereby refers to paragraphs I, II, III, IV, V, VI and VII of its first separate and distinct

defense and to paragraph II of its second separate and distinct defense and by this reference hereby makes the last-mentioned paragraphs a part of this, its third separate and distinct defense, in the same manner and with the same effect as though said paragraphs were set forth here at length.

II.

Defendant is informed and believes and therefore alleges that when plaintiff on November 18th, 1948, refused to pay said checks aggregating \$97,207.00, it knew that defendant on November 15th, 1948, had credited said account of Lofendo with said sum of \$97,207.00; and that when plaintiff refused to pay said checks aggregating \$97,207.00, it also knew that said \$97,207.00 would be applied to the payment of checks drawn by Lofendo against said account payable to the order of United Produce Company for which plaintiff prior to such payment had given United Produce Company credit. On November 15th, 1948, defendant applied said \$97,207.00, plus said balance of \$13,061.17 to the credit of Lofendo in said account when said \$97,207.00 was credited thereto, to said checks aggregating \$109,569.15 and which had been drawn by Lofendo on his said account and were payable to United Produce Company. Defendant is informed and believes and therefore alleges that plaintiff upon deposit of said checks aggregating \$109,569.15 with it had given United Produce Company credit for the amount thereof before the collection of the funds represented thereby; that, therefore, when

defendant paid the last-mentioned checks it was in effect paying an obligation in the sum of \$109,569.15 due plaintiff by United Produce Company which United Produce Company would not otherwise have been able to pay; and that plaintiff attempted to revoke its said payment of said six checks drawn by United Produce Company on plaintiff payable to Lofendo because by revoking said payment plaintiff would increase the balance to the credit of United Produce Company in its said account with plaintiff which said balance plaintiff was in a position to apply and on or about November 18th, 1948, did apply on account of United Produce Company's indebtedness to it. Plaintiff is estopped to revoke the payment of said six checks because plaintiff, with knowledge of said kiting and of defendant's reliance on said representations that said checks being paid by it and said credits being given by it arose out of bona fide transactions, should not in equity and good conscience be permitted to take advantage of said credit of \$97,207.00 and thus reduce United Produce Company's obligation to it in this amount while at the same time revoking payment of said six checks which revocation if allowed would have these results: (i) it would increase the credit balance of United Produce Company applicable by plaintiff to the payment of the latter's obligations to it; and (ii) it would compel defendant against its wishes to become Lofendo's creditor in the amount of said overdraft of \$82,-296.14 and thus compel defendant to absorb part of the loss which plaintiff should bear.

Wherefore, defendant prays (i) that this court hold that plaintiff did not have the right to revoke its payment of said six checks and that plaintiff recover nothing from defendant; and (ii) that if this court holds that plaintiff had the right to revoke said payment of said six checks, it nevertheless is not entitled to recover anything from defendant; and (iii) for such other, further and different relief as this court may deem equitable and meet.

.....,
S. B. Stewart, Jr.,

.....,
G. D. Schilling,

.....,
Morse Erskine.

ERSKINE, ERSKINE &
TULLEY,

By,
Morse Erskine,
Attorneys for Defendant.

Interpleader Counterclaim

Defendant, as an interpleader counterclaim against plaintiff, Lofendo; Eugene J. O'Riley, trustee in bankruptcy of United Produce Company, and Cy Mouradick, alleges as follows:

I.

Defendant hereby refers to paragraphs I and II of its first separate and distinct defense of its fore-

going answer and hereby makes the last-mentioned paragraphs a part of this, its interpleader counter-claim, in the same manner and with the same effect as though the last-mentioned paragraphs were set forth here at length.

II.

Defendant hereby refers to paragraph III of its first separate and distinct defense of its said answer, except the last two sentences of said paragraph III, and by this reference hereby makes said paragraph III, except its last two sentences, a part of this its interpleader counterclaim, in the same manner and with the same effect as though said paragraph III, except its last two sentences, were set forth here at length.

III.

Defendant is informed and believes and therefore alleges that on November 15th, 1948, and for several months prior to that date, United Produce Company was a corporation with its principal place of business in Chicago, Illinois, engaged in the business of a commission merchant, that is in the business of buying wholesale vegetables, fruits and other produce and selling such produce to wholesale and retail distributors; and that for a period of at least two months prior to November 19th, 1948, Lofendo was an agent of the United Produce Company employed by it to purchase from producers for its account vegetables, fruits and other produce.

IV.

Defendant hereby refers to all of paragraph VI

of its first separate and distinct defense of said answer, except the last sentence of said paragraph VI, and by this reference hereby makes said paragraph VI, except its last sentence, a part of this, its interpleader counterclaim, in the same manner and with the same effect as though said paragraph VI, except its last sentence, were set forth here at length.

V.

On or about December 1st, 1948, United Produce Company was adjudicated bankrupt by the United States District Court for the Northern District of Illinois, Eastern Division. On or about said date on which United Produce Company was adjudicated bankrupt, Eugene J. O'Riley was appointed receiver of the estate of United Produce Company. On or about said date on which Eugene J. O'Riley was appointed such receiver, he qualified as such receiver and entered upon his duties as such. Thereafter Eugene J. O'Riley was appointed trustee of said estate and qualified as such trustee. Eugene J. O'Riley continued to act as receiver of said estate from his appointment as such until his appointment as trustee, and he is now and ever since his appointment as trustee has been acting in that capacity. On or about January 13th, 1949, the last-mentioned court made an order, a copy of which is attached hereto, marked "Exhibit D," and is hereby referred to and made a part hereof. Defendant is informed and believes and therefore alleges that pursuant to the last-mentioned order Lofendo executed and delivered to Eugene J. O'Riley as such

receiver his check drawn on defendant in the amount of said balance of \$30,934.76, which stood to the credit of Lofendo in his account at the close of business on November 19th, 1948. Said balance of \$30,934.76 was reduced on December 23, 1948, to \$30,920.36 by said charge against it in said sum of \$14.40. Eugene J. O'Riley, as such trustee, by virtue of said order and the execution and delivery to him of the last-mentioned check claims the whole of said balance of \$30,920.36.

VI.

On or about March 31st, 1949, Cy Mouradick, as plaintiff, commenced an action against Lofendo, as defendant, in the Superior Court of the State of California in and for the County of Kern in which action Cy Mouradick seeks to recover from Lofendo the sum of \$12,336.21. At the time Cy Mouradick commenced the last-mentioned action, he caused said account of Lofendo with defendant to be attached by leaving with the East Bakersfield Branch of defendant at which said account of Lofendo was carried a copy of the writ of attachment issued in said action, together with a notice to the effect that all credits due by defendant to Lofendo were attached in pursuance of such writ. Said action has not been tried and is still pending in the last-mentioned court and said attachment is now and ever since its said levy on defendant has been in full force and effect. Mouradick by virtue of said attachment claims an interest in said balance of

\$30,920.36 equal to the amount Mouradick may recover against Lofendo in said action.

VII.

Plaintiff by virtue of the fact that said balance of \$30,920.36 was created by crediting said account of Lofendo with the aggregate amount of said six checks, the payment of which it attempted to revoke, may claim that it is entitled to the last-mentioned balance; and Lofendo, despite the fact that he executed and delivered to Eugene J. O'Riley, as such trustee, said check, may nevertheless claim that he is still entitled to the last-mentioned balance.

VIII.

Defendant is unable to decide and determine the respective rights of Eugene J. O'Riley, as trustee, and Cy Mouradick to said balance of \$30,920.36, and defendant is also unable to decide any claims plaintiff and Lofendo may make to the last-mentioned balance. Defendant has no claim upon the last-mentioned balance and is ready and willing to and hereby offers to deposit the same in this court, or deliver the same to such person as this court may direct.

IX.

Defendant is informed and believes and therefore alleges that Eugene J. O'Riley and Frank C. Lofendo are citizens and residents of the State of Illinois and Cy Mouradick is a citizen and resident of the State of California; defendant is informed and believes and therefore alleges that if this court

orders Eugene J. O'Riley, as such trustee; Cy Mouradick and Frank C. Lofendo to be made parties defendant to respond to this interpleader counterclaim, Eugene J. O'Riley and Frank C. Lofendo will voluntarily appear in this action and subject themselves to the jurisdiction of this court, but that if they do not do so this court, as it will have jurisdiction of the res (said balance of \$30,920.36) can get jurisdiction of Eugene J. O'Riley, as such trustee, and Frank C. Lofendo by constructive service of process, and that therefore Eugene J. O'Riley and Frank C. Lofendo can be made parties to this action without depriving this court of jurisdiction of this action.

X.

Defendant has incurred costs and expenses and will continue to incur costs and expenses in maintaining this interpleader counterclaim, and it has incurred and will continue to incur to its attorneys who are representing it in this action an obligation to pay such attorneys a reasonable fee for their services in connection with the maintaining of said interpleader counterclaim.

Wherefore, defendant prays that the court order Eugene J. O'Riley, as such trustee; Cy Mouradick and Frank C. Lofendo to be made parties defendant to respond to the complaint of plaintiff and this interpleader counterclaim; that Eugene J. O'Riley, as such trustee; Cy Mouradick, Lofendo and plaintiff be required to interplead together and among themselves concerning their said claims to said bal-

ance of \$30,920.36; that defendant upon either paying said balance into this court or delivering the same to such person as this court shall direct, shall be discharged from any liability to any of said persons on account of said balance; that defendant recover judgment for said costs, expenses and attorneys fees incurred by it in connection with the maintaining of this interpleader counterclaim; and that defendant have such other and further and different relief as to this court may seem equitable and meet.

Dated June 15, 1950.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE.

ERSKINE, PILLSBURY &
TULLEY,

By /s/ MORSE ERSKINE,
Attorneys for Defendant.

Exhibit "A"

Brobeck, Phleger & Harrison

Attorneys at Law

One Eleven Sutter Street, San Francisco 4

Cable Address

Brobeck

Telephone

Sutter 1-0666

December 3, 1948.

Bank of America National Trust
and Savings Association,
300 Montgomery Street,
San Francisco, California.

Re: Merchandise National Bank of Chicago.

Gentlemen:

We deliver to you herewith demand of Merchandise National Bank of Chicago to transfer the entire balance of its account with you to Federal Reserve Bank of Chicago for its credit and advice. Although oral demand was made upon you at our conference of November 23rd, supplementing certain demands by wire, the present written demand was deferred so that sufficient time would elapse to permit current items to clear and the account to reach a static figure.

Under date of November 19, 1948, Merchandise National Bank returned to your East Bakersfield branch as unpaid and uncollected items six checks drawn on it by United Produce Company, each payable to Frank C. Lofendo, dated November 8, 1948,

numbered 31054-31059, inclusive, in the following amounts: \$18,426, \$15,665, \$17,976, \$22,692.50, \$20,-031 and \$18,426. By letter of November 22, 1948, your East Bakersfield branch returned these unpaid and uncollected checks to Mr. F. C. Messenger, Comptroller of the Merchandise National Bank.

Our client, Merchandise National Bank of Chicago, declines to accept the return of these checks. The position of our client on the matter being entirely clear, it seems pointless to be mailing these checks back and forth. They have been forwarded to us and are now in our possession subject to your disposition. We herewith tender them to you.

Very truly yours,

BROBECK, PHLEGER &
HARRISON,

By /s/ MOSES LASKY.

ML:MS

enc.

Exhibit "B"

Merchandise National Bank of Chicago
Merchandise Mart, Chicago 54

Allen R. LeRoy,

Vice President.

December 1, 1948.

Bank of America National Trust & Savings Assoc.
300 Montgomery Street,
San Francisco, California.

Gentlemen:

The undersigned has as of this date on deposit with you to this account the sum of Two Hundred

Ninety Thousand Six Hundred Fifty-Nine Dollars and Four Cents (\$290,659.04).

Demand is hereby made upon you to transfer forthwith the entire balance of Two Hundred Ninety Thousand Six Hundred Fifty-Nine Dollars and Four Cents (\$290,659.04) to the Federal Reserve Bank of Chicago for the credit and advice of the undersigned.

Very truly yours,

MERCHANDISE NATIONAL
BANK OF CHICAGO,

/s/ ALLEN R. LeROY,
Vice President.

ARL

C

Exhibit "C"

Merchandise National Bank of Chicago
Merchandise Mart, Chicago 54

Allen R. LeRoy,
Vice President.

December 8, 1948.

Bank of America National Trust & Savings
Association,
300 Montgomery Street,
San Francisco, California.

Gentlemen:

On December 4, 1948, a written demand in the form of a letter was served on you by our attorney, Mr. Lasky of Brobeck, Phleger & Harrison, for the

balance in our account with you. You have failed and refused to comply with that demand, apparently on the contention that the balance owed to us is less than we claim to be the fact.

We are prepared to receive from you a remittance in such amount as you are willing to admit is due and owing. This is without prejudice to our claim that a greater amount is owing and without prejudice to our right to recover interest at the legal rate on all sums from the first demands made on you until date of remittance.

Remittance may be made by transfer to the Federal Reserve Bank of Chicago for our credit and advice.

Very truly yours,

MERCHANDISE NATIONAL
BANK OF CHICAGO,

By /s/ ALLEN R. LeROY,
Vice President.

ARL

C

Exhibit "D"

In the United States District Court for the Northern
District of Illinois, Eastern Division

In Bankruptcy—No. 48 B 539

In the Matter of

UNITED PRODUCE COMPANY, an Illinois
Corporation,

Debtor.

ORDER

This matter coming on to be heard on the 14th day of January, 1949, on motion of Raymond W. Ickes, attorney for Eugene J. O'Riley, receiver duly appointed by order of this Court on 6 December, 1948, the parties being present in open court both personally and by their attorneys, the Court having heard the arguments of counsel and being fully advised in the premises and having jurisdiction of the parties, Finds:

1. That there stands in the name of Frank C. Lofendo at Bank of America National Trust and Savings Association, East Bakersfield, California Branch, a checking account in which there are on deposit funds in the amount of Thirty Thousand Nine Hundred Thirty-Four Dollars and Seventy-Six Cents (\$30,934.76), representing the balance in said account after all debits and credits;

2. That said funds were deposited in said account by and on behalf of United Produce Company, Inc., debtor herein;

3. That Frank C. Lofendo claims no property interest in said funds and has indicated in open court his willingness to aid the receiver in the recovery of said funds on behalf of the estate of the debtor;

and it is therefore hereby

Ordered that Frank C. Lofendo make, execute and deliver to Eugene J. O'Riley, receiver herein, his check drawn on said Bank of America National Trust and Savings Association, East Bakersfield, California Branch, in the amount of Thirty Thousand Nine Hundred Thirty-Four Dollars and Seventy-Six Cents (\$30,934.76), payable to the order of Eugene J. O'Riley, receiver of the estate of the debtor.

Further Ordered that such action on the part of Frank C. Lofendo shall not be taken as an admission or evidence that said Frank C. Lofendo is indebted to said United Produce Company.

Entered this 13th day of January, 1949.

CAMPBELL,

United States District Judge.

In the United States District Court for the Northern District of Illinois, Eastern Division

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an Order made and entered in said Court on the 13th day of January, 1949,

as fully as the same appears of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 25th day of January, 1949.

[Seal] ROY H. JOHNSON,
Clerk.

By E. S. DAVIS,
Deputy Clerk.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 24, 1950.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Leave of court to amend the complaint having been granted on motion made in open court on the trial of this cause, plaintiff Merchandise National Bank of Chicago files this, its amended complaint, against defendant Bank of America National Trust and Savings Association and alleges a claim for relief as follows:

I.

At all times herein mentioned plaintiff Merchandise National Bank of Chicago was and is a national banking association organized and existing under the laws of the United States, located in the State of Illinois, and having its principal place of business in Chicago, Illinois.

II.

At all times herein mentioned defendant Bank of America National Trust and Savings Association was and is a national banking association organized and existing under the laws of the United States, located in the State of California, with its head office and principal place of business in San Francisco, California, in the Northern District of California, wherein it resides and is doing business.

III.

Within the meaning of Section 1348 of Title 28, United States Code, at all times herein mentioned Illinois, and defendant was and is a citizen of the Illinois, and defendants was and is a citizen of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000).

IV.

At all times herein mentioned the plaintiff has had and now has a deposit account with the defendant with a credit balance in plaintiff's favor, and defendant has owed and now owes the amount of said balance to the plaintiff. On or about November 23, 1948, and at all times thereafter until February 18, 1949, the said credit balance was in the amount of \$386,283.07. On or about November 23, 1948, plaintiff made demand upon defendant to pay to plaintiff the entire amount of the credit balance in said account, but the defendant refused and failed to pay to the plaintiff any part thereof,

except that on February 18, 1949, after repeated demands, the defendant paid to the plaintiff the sum of \$183,235.47, but defendant has failed and refused and still fails and refuses to pay to the plaintiff any other sum.

V.

In the premises the defendant is indebted to the plaintiff for interest at the legal rate, to wit, 7% per annum, on the sum of \$183,235.47 from November 23, 1948, to and including February 18, 1949, being the sum of \$3,069.50; and defendant is further indebted to the plaintiff in the sum of \$203,047.60 plus interest thereon at the legal rate from November 23, 1948, until paid.

Wherefore, plaintiff prays judgment against defendant for the sum of \$206,117.10, together with interest at the rate of 7% per annum on \$203,047.60 from November 23, 1948, until paid, and on \$3,069.50 from February 18, 1949, until paid, for its costs of suit herein incurred and for such other and further relief as may be meet and proper in the premises.

/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 29, 1950.

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
City and County of San Francisco—ss.

Morse Erskine, being duly sworn, deposes and says:

I am one of the attorneys for the defendant in the above-entitled action. I am that one of the attorneys for the defendant who has been handling the litigation from the time it was commenced.

Depositions were taken in Chicago in this action commencing on or about December 5, 1949, and continuing until on or about December 16, 1949. I represented the defendant upon the taking of these Chicago depositions.

One of the Chicago depositions was that of Allen R. LeRoy.

I quote from pages 103-104 of Mr. LeRoy's deposition as follows:

"Q. All right. Now, would you please explain to me, Mr. LeRoy, why there was an error in the sending out of the advices of credit with respect to the six checks aggregating \$113,000, when, so far as I know, no claim has been made by the Merchandise Bank that there was an error in sending out the advices of credit, Defendant's Exhibits for identification, B, C, D and E on the taking of the Messenger Deposition.

"Mr. Lasky: Just a moment. May I hear that question again, please, Mr. Reporter.

(The question was thereupon read by the Reporter as above recorded.)

“Mr. Lasky: That is an improper question, but I will not press it.

“Mr. Erskine: I think it is proper cross-examination.

“The Witness: Shall I answer?

“Mr. Lasky: Go ahead.

“A. As a matter of fact, the same error was committed in paying those, or in reporting them paid, as in the reporting of the \$113,000 paid; but this advice had been received by the Bank of America, and they had acted on it, whereas the other advice had not been received by the Bank of America.

“Perhaps we might take your advice, and file a claim for that.

“Mr. Erskine: I move that the last sentence of the statement go out.

“Mr. Lasky: Not only do I contend that it should stay in, but I am very seriously thinking about following the suggestion.

“The Witness: I think it is a hell of a good idea!

By Mr. Erskine:

“Q. Then as I understand you, Mr. LeRoy, the same error was made with respect to the \$89,000 as was made with respect to the \$113,000; is that right? A. Yes, sir.”

The advices of credit referred to in the first ques-

tion put to Mr. LeRoy in the extract which has just been quoted as defendant's Exhibits for identification B, C, D, E, upon the taking of Messenger's deposition (the correct designations given these Exhibits for identification upon the taking of the Messenger deposition were 15 B, C, D and E) were the advices of credit relating to checks aggregating \$89,813.10 which advices of credit were introduced in evidence upon the trial of this action.

Plaintiff by the amendment which it is seeking to make to its complaint seeks to recover from defendant the sum represented by said checks for \$89,813.10.

As indicated by the extract from the LeRoy deposition quoted above, counsel for plaintiff when in Chicago in December, 1949, was seriously considering making claim on behalf of plaintiff against defendant for said \$89,813.10.

On or about April 27, 1950, a pre-trial conference in this action took place before the Hon. Louis E. Goodman, one of the judges of the above-entitled Court. Rule 16 FRPC provides that in such a conference "The necessity of desirability of amendments to the pleadings" may be considered. Pursuant to said Rule 16, I, as attorney for defendant, upon said pre-trial conference, informed the Court that defendant had taken depositions in Chicago which showed the advisability of amending its answer in certain respects; that defendant therefore intended to amend its answer; and that defendant would prepare and serve upon the attorneys for plaintiff a copy of the proposed amendment as soon

as the same could be prepared. Judge Goodman thereupon instructed me to prepare and serve such a proposed amendment as soon as practical. I said that I would do so, but that I would not move to amend defendant's answer in the respects in which I believed it should be amended until the case was called for trial. At that time the case was set for trial for May 23, 1950; but it was not anticipated that it would go to trial on that date but that it would be reached at a later date. I caused a copy of the proposed amendment to be delivered to attorneys for plaintiff on or about May 5, 1950.

At this pre-trial conference, counsel for defendant did not say anything with respect to any intention on his part to amend his complaint in any way whatever.

When plaintiff did not seek to file an amendment to its complaint, defendant assumed that plaintiff had abandoned its claim that plaintiff had a right to recover from defendant said additional sum of \$89-813.10; and defendant in trying this action did not introduce evidence for the purpose of meeting any such claim on the part of plaintiff. The only evidence which defendant introduced relating to the point was introduced incidentally because defendant believed that such evidence had a bearing upon plaintiff's claim to recover its payment of the checks referred to in the trial as "the six checks."

Defendant did not believe that plaintiff would attempt to make such additional claim in this action until counsel for plaintiff stated in Court on Monday afternoon, June 26, 1950, after both sides had

rested, that he would like permission of the Court to file an amended complaint for the purpose of making such additional claim. Such statement by plaintiff's counsel took defendant entirely by surprise and defendant had not theretofore made any effort to prepare to answer such application.

Wherefore, defendant prays for an order of this Court setting aside its order allowing plaintiff to file an amended complaint and for such other relief as may be deemed meet.

/s/ MORSE ERSKINE.

Subscribed and sworn to before me this 29th day of June, 1950.

[Seal] /s/ LAURA J. ROOP,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Sept. 28, 1952.

[Endorsed]: Filed June 29, 1950.

[Title of District Court and Cause.]

STIPULATION CONCERNING TESTIMONY OF DEAN HOWELL

It Is Hereby Stipulated, by and between the undersigned parties, that the attached memorandum entitled "Testimony of Dean Howell," may be deemed to be the testimony of Dean Howell, duly given in this cause under oath on behalf of whatever party shall offer it in evidence at the trial.

Each party, however, reserves the right at the time the testimony is offered to make any objection it may see fit to any part thereof, save and except

(a) There will be no objection on the ground that the witness is not personally testifying in court or that the testimony has not been taken in the form of a deposition;

(b) There shall be no objection to the recitals of the contents of any writing on the ground of the best evidence rule or on the basis that the writing itself should be produced; and

(c) There shall be no objection made to the attached memorandum as a whole, but objections, if any, should be made to specific parts thereof just as if each statement were in response to a separate question.

Dated May 29, 1950.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,
Attorneys for Plaintiff.

/s/ S. B. STEWART, JR.,
/s/ G. D. SCHILLING,
/s/ MORSE ERSKINE,
ERSKINE, PILLSBURY &
TULLEY,

By /s/ MORSE ERSKINE,
Attorneys for Defendant.

[Endorsed]: Filed June 21, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN R. McDONOUGH

State of California,

City and County of San Francisco—ss.

John R. McDonough, being first duly sworn, deposes and says:

I am one of the attorneys for the plaintiff in this case.

On Monday, June 26, 1950, during the trial of this cause, I was sitting at plaintiff's counsel table in the court room, on the side next to the counsel table occupied by Mr. Erskine, counsel for defendant. When Mr. Lasky arose to address the court and after he stated "If the court please, now that the evidence is closed, I wish to make a motion for leave to amend the complaint to conform to evidence," and before he had said anything further, I heard Mr. Erskine say to Mr. Tobey, "Here comes the eighty-nine thousand."

/s/ JOHN R. McDONOUGH.

Subscribed and sworn to before me this 19th day of July, 1950.

[Seal] /s/ EUGENE P. JONES,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 19, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF MOSES LASKY IN OPPOSITION TO MOTION OF DEFENDANT FOR AN ORDER SETTING ASIDE ORDER ALLOWING PLAINTIFF TO FILE AMENDED COMPLAINT

State of California,

City and County of San Francisco—ss.

Moses Lasky, being duly sworn, deposes and says: I am one of the attorneys for the plaintiff in the above-entitled action. I tried the case on behalf of plaintiff, and I am personally familiar with all the facts herein stated.

In December, 1949, defendant took the deposition of Frederick C. Messenger in Chicago, Illinois. On December 5, 1949, Mr. Erskine, defendant's attorney, interrogated the witness concerning the collection of checks for \$89,813.10 and inquired why, if there was an error in sending out the advice of credit for the items totaling \$113,216.50, the same error had not been made with respect to the \$89,-813.10. This subject is covered at pages 225-231 of the Messenger deposition.

On the next day, December 6, 1949, the following colloquy occurred, as reported at pages 356-360 of that deposition:

“Mr. Lasky: While he is looking at that, and this can be on the record: May I ask you a question?

“When I took depositions of various employees and officers of the Bank of America I was given

documents only when I asked for some specific document.

"Do I have your assurance that I have every scrap of paper in the files of the Bank of America relating to Lofendo, United Produce Company and Merchandise National Bank, so far as Lofendo and United Produce Company are concerned?

"Mr. Erskine: I think you have, although I can't be positive. I will check and make sure. I produced everything you asked for.

"Mr. Lasky: But I made no blanket demands, I made specific demands.

"Mr. Erskine: We produced everything you asked for.

"Mr. Lasky: That does not answer my question.

"Mr. Erskine: I did answer it. I think you have everything.

"Mr. Lasky: If, subject to what Mr. Riordan says, if I have your assurance that you have given to me every memo of any kind, scrap of paper in the files of Bank of America relating to Lofendo, the Lofendo Account, Merchandise National Bank, so far as it relates to Lofendo and the Lofendo account, and the United Produce Company, then, even though I don't think you are entitled to it, we will do the same here in respect to you.

"Mr. Erskine: How about it, Mr. Tobey? I asked you to dig them up.

"Mr. Tobey: You asked me for a group of records and I handed the whole bunch at once, and you went through and marked them and took them, A, B, C, D and E—

"Mr. Lasky: You retained one document under what I thought was a wholly unrelated [unjustified?] claim of privilege.

"Mr. Erskine: That is true. We retained Tobey's report to Schilling.

"Mr. Lasky: I don't believe under the evidence produced then it was a privileged document because it was not prepared as a report to Schilling.

"Mr. Erskine: It was. It was addressed to him, as I remember, wasn't it? Isn't that correct Mr. Tobey?

"Mr. Tobey: That is correct.

"Mr. Lasky: All right. With that exception, you have given me everything?

"Mr. Erskine: Is that right, Mr. Tobey?

"Mr. Tobey: Yes.

"Mr. Lasky: All right, we will proceed the same with you, then.

"There is one item you did not show me, though, I am sure, and that is the evidence showing when, the hour of the day, when, on November 17th the Advice of Credit was received from Merchandise National Bank covering the \$89,000-odd dollars that you were talking about yesterday, and when on that day a check of Lofendo payable to Feldbaum for approximately \$23,000 was paid.

"Mr. Erskine: Have we any record of the time of day on which those papers were received? Is there any?

"Mr. Tobey: I don't know that.

"Mr. Erskine: Do you stamp the advice of credit?

"Yet, we offered in evidence an Advice of Credit showing the receipt of that \$89,000.

"Mr. Tobey: Yes. If there is any documents like that we haven't done there is no way, we cannot add to the thing, other than to make a statement now if there is anything there that is missing I would say, subject to Mr. Erskine's approval, I don't know of anything that we would not submit to you.

"Mr. Lasky: Then when we return to San Francisco you gentlemen will undertake to look into the records of your bank to ascertain whether there is anything which shows the hour of the day when the Advice of Credit was received at the East Bakersfield Branch of the \$89,000-odd item, and to show the time of the day, to show when the check to Feldbaum was paid.

"You recall on that day, November 17th, three checks were honored at the East Bakersfield branch and one of them was to Feldbaum, and the check to Feldbaum is among the exhibits which Mr. Tobey produced on his deposition, and if the records would show the time of receipt and payment of those items you will produce them?

"Mr. Tobey: Yes.

"Mr. Erskine: Make a note of that.

"Mr. Lasky: Then we will produce these documents, because my attitude is the same as that Mr. Erskine has expressed, that we have nothing to conceal, even though we think these things are irrelevant, and we will battle that out at the trial."

By the foregoing colloquy Mr. Erskine and Mr. Tobey represented to me that they had already fur-

nished to me all the available information on the subjects referred to, unless they should inform me otherwise and should furnish additional data after their return to San Francisco. Thereafter, neither Mr. Erskine nor Mr. Tobey furnished any further information to me until the trial and then only as related below.

On the first day of the trial, June 15, 1950, the court adjourned early in the afternoon with the request to counsel to meet and attempt to stipulate to facts. Thereupon I went to Mr. Erskine's office and stated to him and to Mr. Tobey the matters upon which I desired a stipulation. While engaged in this discussion, I referred to the promise made in Chicago by Mr. Erskine and Mr. Tobey to furnish further information, if there was any, concerning the item of \$89,813.10 and the three checks for \$75,586.86, of which the Feldbaum check referred to in the colloquy quoted above was one. I inquired whether Mr. Erskine or Mr. Tobey had any further information to give him on the subject. Thereupon Mr. Tobey, in an embarrassed fashion, stated that the checks for \$75,586.86 had been lying around defendant's East Bakersfield branch for several days. I then asked why he had not told me the fact at the time I took his deposition. He replied that I had directed no questions to that subject.

On the next trial day, June 16th, all counsel met in the court's chambers, with the court, to discuss stipulations and further procedure. I then stated that I demanded production by defendant of a cer-

tain report made by Mr. Tobey, which defendant had refused to produce during the depositions on the grounds of privilege. Mr. Erskine then stated that he would consider whether he would produce the report, and I replied that if he refused to do so, I would call Mr. Tobey to the witness stand, before plaintiff's case was closed, to lay the foundation for requesting an order of the court to compel production.

On the next day of the trial, June 19th, Mr. Erskine, cross-examining Mr. Messenger, again made inquiry into the matter of the \$89,813.10, similar to the inquiry made in the course of the deposition in Chicago. He thus brought the subject into the case. He concluded his inquiry on this subject with the statement (R. Tr. 220) "I think we will be able to stipulate to some additional facts."

Mr. Erskine failed to give any response to my request for the production of Mr. Tobey's alleged privileged document until the sixth day of the trial, June 22nd. Mr. Erskine then addressed the court concerning the alleged privileged document. He denied that it contained anything new. He said (Tr. 528),

"But there is nothing in the report that is not in evidence."

And again (Tr. 532) :

"Now, we are going to give them the report, your Honor, because there is nothing in that report that is not completely before this Court. * * * it does not hurt us, I will be frank to say

that. Otherwise I would put up a fight on the proposition."

Court and counsel then met in chambers for further discussion of stipulations. Then and there, in chambers, Mr. Erskine for the first time produced and handed to me the so-called confidential Tobey report. The trial then recessed for the lunch period. During the lunch period I was able, for the first time, to examine that report.

On return to court after lunch I immediately called attention to three new matters of which I first learned from the report and stated that I desired a stipulation about them (Tr. 535). The following colloquy occurred:

"Before you do that, may I suggest that, having examined the report of Mr. Tobey, there are two or three matters in there that I would like to get into evidence, and perhaps we can get it in by agreement.

"Mr. Erskine: What are they? Of course, your Honor, he is entitled to see the report, perhaps, as part of the discovery but the report is clearly hearsay.

"Mr. Lasky: That is right; that is right, but it makes certain statements of fact.

"The Court: Which reflects a situation which you may agree upon.

"Mr. Lasky: That was it. Obviously, if we couldn't agree upon it, I would have to call Mr. Tobey and ask questions on it."

Mr. Erskine refused to stipulate to two of the three matters. The third had to do with the checks

for \$75,586.86 and their relationship to the \$89,-813.10. The following colloquy then occurred:

"Mr. Erskine: I agree to that but I would like to put it in my own words, and consider the words in which it is put. We can put it in that stipulation that we were discussing the other day.

"Mr. Lasky: You wish to draw up some language. I think we can wait.

"Mr. Erskine: Mr. Tobey doesn't agree with that. However, I am perfectly willing to put into the stipulation that we were discussing the other day when this same subject what is in the report. That is the fact.

"The Court: With reference to that last matter?

"Mr. Erskine: Yes. I don't know as counsel's language is quite correct.

"Mr. Lasky: I was summarizing it pretty hastily, obviously.

"The Court: Very well then, you can work on that as part of the stipulation.

"Mr. Erskine: Part of the other stipulation.

"The Court: Very well.

"Mr. Erskine: I think I should be permitted to go ahead with my case.

"Mr. Lasky: This is one of the points kept open on my case."

Thereafter I was waiting upon Mr. Erskine to prepare the proposed stipulation in his own language. Mr. Erskine failed to prepare it. After waiting patiently for some time, I prepared a draft, since the trial was drawing to a close. This draft was reviewed in the court's chambers among counsel

and the court on Saturday, June 24th. Mr. Erskine and Mr. Tobey refused to agree to it as prepared, and suggested changes. I accepted all changes which they requested, and the stipulation was thereupon at that late date finally agreed to and made a part of Plaintiff's Exhibit 14. The trial then adjourned over Sunday, June 25th.

On Sunday, June 25th, I was for the first time able to review the facts relating to the \$89,813.10 as they had finally come to my attention and as they had finally been established by the undisputed, and in large part stipulated, evidence. I then concluded that these facts, of which I had not theretofore been apprised, entitled the plaintiff to recover the sum of \$89,813.10, in addition to the sum of \$113,216.50.

Consequently, on the very next day, Monday, June 26th, I moved the court for leave to amend the complaint. I respectfully represent to the Court that in all respects I have acted diligently and as speedily as the facts became available, and that the failure to obtain the facts and bring them into the case at an earlier time was due entirely to the unwillingness of defendant's counsel to produce them or to agree upon them.

The motion to amend, as made on Monday, June 26, 1950, was "to conform to the evidence" (R. Tr. 773). It was based on evidence fully before the Court, and defendant's counsel has in no way been taken by surprise or prejudiced. In further support of this statement that counsel has not been surprised, plaintiff submits herewith an affidavit of

John R. McDonough covering matters of which I have no personal knowledge.

/s/ MOSES LASKY.

Subscribed and sworn to before me this 19th day of July, 1950.

[Seal] /s/ EUGENE P. JONES,
Notary Public in and for the City and County of San Francisco, State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 19, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF MR. MORSE ERSKINE IN SUPPORT OF MOTION TO STRIKE COMPLAINT

State of California,
City and County of San Francisco—ss.

Morse Erskine, being duly sworn, deposes and says:

I am making this affidavit in opposition to the affidavit filed by Mr. Lasky.

On page 4 of his affidavit Mr. Lasky refers to the following colloquy which took place during the taking of the Chicago deposition:

"Mr. Lasky: Then when we return to San Francisco you gentlemen will undertake to look into the records of your bank to ascertain whether there is

anything which shows the hour of the day when the Advice of Credit was received at the East Bakersfield Branch of the \$89,000-odd item, and to show the time of the day, to show when the check to Feldbaum was paid.

"You recall on that day, November 17th, three checks were honored at the East Bakersfield Branch and one of them was to Feldbaum, and the check to Feldbaum is among the exhibits which Mr. Tobey produced on his deposition, and if the records would show the time of receipt and payment of those items you will produce them?

"Mr. Tobey: Yes.

"Mr. Erskine: Make a note of that."

It should be noted that in this colloquy Mr. Lasky asked Mr. Tobey and me to undertake to look into the records of the bank to ascertain the two facts mentioned in the colloquy. Mr. Lasky wanted this information to determine whether his client had, in his opinion, a claim against defendant for \$89,813.10. It would have been a very easy matter for him to have asked me for this information. A simple telephone call would have sufficed. But neither at the pre-trial conference nor at any time prior to the trial did Mr. Lasky ask me for it.

Prior to the taking of the Chicago depositions in December of last year, Mr. Lasky took in San Francisco the depositions of certain of defendant's officers, including Mr. Etribou and Mr. Tobey. Upon the taking of the San Francisco depositions, records of defendant were marked for identification, and photostatic copies of such records were made

a part of the depositions, and photostatic copies thereof were delivered to Mr. Lasky.

In the Chicago colloquy Mr. Lasky asked Mr. Tobey and me to look into the records of the Bank to ascertain two facts, (1) whether there is anything which shows the hour of the day when the advices of credit for the four checks for \$89,813.10 were received and (2) when the check to Feldbaum was received and paid.

Upon the taking of Mr. Etribou's deposition the advices of credit for the four checks aggregating \$89,813.10 were marked as part of Plaintiff's Exhibit 27 for identification. And these advices of credit were introduced in evidence upon the trial and marked Defendant's Exhibit J. Each of these advices of credit has the stamp of the branch on its back showing that it was received at the Branch on November 16th at approximately 11:30 a.m. And so after the San Francisco depositions were taken Mr. Lasky either knew the hour of the day when these advices of credit were received at the Bakersfield Branch or had this information readily available to him.

The second item mentioned by Mr. Lasky in the Chicago colloquy was when the check to Feldbaum was received and paid. Upon the taking of Mr. Tobey's deposition, all of the cancelled checks drawn by Lofendo on his account at the branch during November, 1948, were marked as Plaintiff's Exhibit 7 for identification. These checks included "the Feldbaum check," that is a check for \$23,724.50, drawn by Lofendo to the order of Max Feldbaum

& Sons Inc., and also two other checks drawn by Lofendo to the order of United, one for \$28,319.87 and the other for \$23,542.49. These three checks aggregate \$75,586.86. The Feldbaum check and the other two checks were perforated "Paid November 17th, 1948." And so after the San Francisco depositions were taken Mr. Lasky either knew or had the information readily available to him that the Feldbaum check and the other two checks were paid on November 17th.

Upon the taking of Mr. Etribou's deposition, the ledger card of the Lofendo account was marked Plaintiff's Exhibit 2 for identification. This ledger sheet shows that as of November 17th there was credited to the account the \$89,813.10 and that as of that day there were charged against the account the Feldbaum check and said other two checks. And so after the taking of the San Francisco depositions Mr. Lasky not only had in his hands a photostatic copy of the Feldbaum check and the other two checks all of which were perforated "Paid November 17th," but he also had in his hands a photostatic copy of the ledger sheet of the Lofendo account showing that these checks were charged against the account as of November 17th, 1948.

Mr. Lasky could have gotten from the records placed in his hands when the San Francisco depositions were taken all the information for which he asked in the Chicago colloquy, except that he could not have learned therefrom when the three checks for \$78,586.86 had been received at the branch.

On pages 6-7 of his affidavit Mr. Lasky states

that after the Tobey report was given to him he called attention to three new matters of which he first learned from the report; that he asked me for a stipulation respecting them; that I refused to stipulate to two of these matters; and that the "third had to do with the checks for \$75,586.86 and their relationship to the \$89,813.10."

An examination of the record (T. 535, 18-25; 536, 1-11) shows that the two matters with respect to which I refused to stipulate related to the crediting of the six checks to Lofendo's account and the debiting of Lofendo's account for the \$97,270.00. These two matters were fully covered by evidence introduced upon the trial and have nothing whatever to do with the alleged excuse presented by Mr. Lasky in his affidavit for having delayed attempting to make on plaintiff's behalf the additional claim for \$89,813.10 until after both plaintiff and defendant had rested and the evidence was closed.

Mr. Lasky, after stating in his affidavit that one of the "new matters" which he learned from the Tobey report, had to do with the checks for \$75,- 586.86 and their relationship to the \$89,813.10, says in his affidavit:

"On Sunday, June 25th, I was for the first time able to review the facts relating to the \$89,813.10 as they had finally come to my attention and as they had finally been established by the undisputed, and in large part stipulated, evidence. I then concluded that these facts, of which I had not theretofore been apprised, entitled the plaintiff to re-

cover the sum of \$89,813.10, in addition to the sum of \$113,216.50.

"Consequently on the very next day, Monday, June 26th, I moved the court for leave to amend the complaint. I respectfully represent to the Court that in all respects I have acted diligently and as speedily as the facts became available, and that the failure to obtain the facts and bring them into the case at an earlier time was due entirely to the unwillingness of defendant's counsel to produce them or to agree upon them."

As a matter of fact, Mr. Lasky did not move to amend his complaint until the late afternoon of the 26th (T. 773, 16-20) after the evidence was closed. But, as I have already said, Mr. Lasky after the San Francisco depositions were taken had in his hands photostatic copies of instruments which showed that the advices of credit for the four checks were received at the branch on the morning of November 16th; that the amount of these four checks were credited to the Lofendo account as of November 17th; and that the three checks for \$75,586.86 were marked paid as of November 17th and were charged against the account as of that day. And so long prior to the trial Mr. Lasky had in his hands all of the instruments showing the facts with respect to the checks for \$75,586.86, and their relationship to the \$89,813.10, except the facts with respect to when the three checks for \$75,586.86 had been received at the branch, and I believe he knew all of these facts, with said exceptions, prior to the commencement of the trial.

On pages 4-5 of Mr. Lasky's affidavit he said that on the first day of the trial, June 15th, 1950, a conference took place between him and Mr. Tobey and myself in which he "referred to the promise made in Chicago by Mr. Erskine and Mr. Tobey to furnish further information, if there were any, concerning the item of \$89,813.10 and the three checks for \$75,586.86"; and then Mr. Lasky on page 5 of his affidavit says:

"Thereupon (at the conference of June 15th) Mr. Tobey, in an embarrassed fashion, stated that the checks for \$75,586.86 had been lying around defendant's East Bakersfield Branch for several days. I then asked why he had not told me the fact at the time I took his deposition. He replied that I had directed no questions to that subject."

The conference referred to by Mr. Lasky in that part of his affidavit just quoted took place in my office. Mr. Lasky, Mr. Riordan, Mr. Tobey and I were present.

My best recollection is that in this conference Mr. Lasky made no reference whatever to the Chicago colloquy to which I have referred. This conference of June 15th was held in my office pursuant to the suggestion made by the court that Mr. Lasky and I should confer in order to arrive at stipulations of fact (T. 116-118). As Mr. Lasky states in his affidavit, in this conference Mr. Tobey told Mr. Lasky that the checks for \$75,586.86 had been retained by the branch for a few days before they were charged against the account. I deny that Mr. Tobey gave Mr. Lasky this information "in an

embarrassed fashion." On the contrary, Mr. Tobey gave this information to Mr. Lasky in an entirely frank manner. I have no recollection that when Mr. Tobey gave this information to Mr. Lasky, Mr. Lasky then asked Mr. Tobey why Mr. Tobey had not said this when his deposition was taken; and my best recollection is that Mr. Lasky did not put any such question to Mr. Tobey.

That part of Mr. Lasky's affidavit last quoted shows he was informed on the first day of the trial that the branch had received the three checks for \$75,586.86 a few days before they were charged to the account; and so the facts show that Mr. Lasky had all the information with respect to the three checks for \$75,586.86 and their relationship to the checks for \$89,813.10 at the very latest on the first day of the trial.

I call attention to the fact that I delivered the Tobey report to Mr. Lasky on Thursday morning, June 22nd (T. 532 and 535). The last day of the trial on which evidence was taken was Monday, June 26th. Mr. Lasky states in his affidavit that it was not until Sunday, June 25th, that he "was for the first time able to review the facts relating to the \$89,813.10." It is clear from what is stated in this affidavit that Mr. Lasky knew all the facts relating to the \$89,813.10 and the \$75,586.86 prior to receiving the Tobey report; but I respectfully submit to the court that if Mr. Lasky did not know these facts until he received the Tobey report, he had plenty of time prior to Sunday, June 25th, within which to review them.

As indicated by my first affidavit filed in support of the motion Mr. Lasky, during the taking of the Chicago depositions, said that he was "very seriously" thinking about making a claim for the \$89,813.10. I respectfully submit that the thought that he might be able to make such a claim did not come to him as a new idea on Sunday, June 25th.

I also respectfully submit that the facts show that Mr. Lasky did not act "diligently and as speedily as the facts became available." I also respectfully submit that his statement that his "failure to obtain the facts and bring them into the case at an earlier time" than Monday, June 26th, "was due entirely to the unwillingness of the defendant's counsel to produce them or to agree upon them," is not at all justified and is entirely incorrect.

As stated in my first affidavit, I informed Judge Goodman at the pre-trial conference which took place on or about April 27th, 1950, that I desired to amend defendant's answer. Judge Goodman at that time instructed me to serve such amendment on Mr. Lasky as soon as practicable. I immediately prepared my amendment and served it on Mr. Lasky on or about May 5th.

In fairness Mr. Lasky at the pre-trial conference should have informed Judge Goodman that he intended to amend his complaint to include the claim for \$89,813.10 or that he was seriously considering doing this. If Mr. Lasky had made such a statement, I am sure that Judge Goodman would have told him that he should make up his mind about the proposition and if he concluded to make

such a claim, he should promptly serve defendant with an amended pleading so that defendant would have adequate notice of the additional claim and could prepare to meet it in the trial.

Under the circumstances this was the only fair thing to do. A claim for \$89,813.10 is not a small claim; and when a plaintiff intends to make such a claim against a defendant he in fairness should at the earliest practical time serve on defendant a pleading giving defendant notice of the claim so that defendant can prepare to meet it; and he should not wait until the evidence on the trial is closed to ask leave to file such a pleading.

It is true, as stated in Mr. McDonough's affidavit, that when on the afternoon of June 26th after the evidence was closed Mr. Lasky stepped to the lectern and said that he wished to make a motion to amend his complaint, the thought went through my mind that the only amendment he could possibly be proposing was the amendment which he had suggested in Chicago, that is an amendment including an additional claim for the \$89,813.10; and it is true that I, when this thought occurred to me, mentioned it to Mr. Tobey. But it is nevertheless the fact that Mr. Lasky could have asked for such leave at the pre-trial conference, or at some other time prior to the trial, so that defendant could have prepared to meet the claim, and that his failure to do so was unfair and inexcusable.

/s/ MORSE ERSKINE.

Subscribed and sworn to before me this 7th day
of September, 1950.

[Seal] /s/ LAURA J. ROOP,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires Sept. 28, 1952.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 7, 1950.

[Title of District Court and Cause.]

STIPULATION OF FACTS

1. In view of the fact that defendant, Bank of America National Trust and Savings Association, has stated in its brief that if its motion to strike the amended complaint of plaintiff is denied it desires to make certain offers of proof, It Is Hereby Stipulated between the parties as follows:

If said motion is denied the following facts shall be deemed to have been proved, subject, however, to a motion by plaintiff that said facts should be stricken on the grounds of immateriality and irrelevancy, namely:

(a) The photostats attached hereto marked Defendant's Exhibit ZZ are true copies of the four checks referred to in Defendant's Exhibit J and may be used in lieu of the originals. The perforations thereon, "PD. 11-12-48" is plaintiff's stamp; the endorsement appearing thereon, "Pay to the

order of any bank, banker or trust company E. Bakersfield Branch, Bank of America N. T. & S. A., Bakersfield, Cal. Successor to Bank of Italy, N. T. & S. A., Bank of America of California," is defendant's endorsement.

(b) On November 17, 1948, plaintiff had on hand checks of United Produce Company drawn on plaintiff and plaintiff did not thereafter return any of said checks then in its hands, including the four checks of which defendant's Exhibit ZZ is a copy, to United Produce Company, but plaintiff retained all such checks, including said four checks, in its possession, except the six checks for \$113,-216.50 which were disposed of as otherwise shown by the evidence.

(c) Plaintiff has not returned the four checks of which defendant's Exhibit ZZ is a copy to defendant nor did plaintiff at any time offer to do so, except that in plaintiff's closing brief filed in this action it made such an offer.

2. It is also stipulated that the photostat attached hereto and marked Plaintiff's Exhibit 35 is a true copy of the front and back of the signature card of Frank C. Lofendo account at defendant's East Bakersfield Branch signed and left with defendant at the opening of that account by Frank C. Lofendo on March 12th, 1948; and that said Exhibit 35 may be used in lieu of the original and that it may be deemed that said exhibit was offered by the plaintiff and received in evidence prior to the close of the trial herein, subject, however, to a

Subscribed and sworn to before me this 7th day of September, 1950.

[Seal] /s/ LAURA J. ROOP,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires Sept. 28, 1952.

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(b) On November 17, 1948, plaintiff had on hand checks of United Produce Company drawn on plaintiff and plaintiff did not thereafter return any of said checks then in its hands, including the four checks of which defendant's Exhibit ZZ is a copy, to United Produce Company, but plaintiff retained all such checks, including said four checks, in its possession, except the six checks for \$113,216.50 which were disposed of as otherwise shown by the evidence.

(c) Plaintiff has not returned the four checks of which defendant's Exhibit ZZ is a copy to defendant nor did plaintiff at any time offer to do so, except that in plaintiff's closing brief filed in this action it made such an offer.

2. It is also stipulated that the photostat attached hereto and marked Plaintiff's Exhibit 35 is a true copy of the front and back of the signature card of Frank C. Lofendo account at defendant's East Bakersfield Branch signed and left with defendant at the opening of that account by Frank C. Lofendo on March 12th, 1948; and that said Exhibit 35 may be used in lieu of the original and that it may be deemed that said exhibit was offered by the plaintiff and received in evidence prior to the close of the trial herein, subject, however, to a

motion by defendant that said exhibit should be stricken on the ground of immateriality and irrelevancy.

3. There was introduced in evidence during the trial and marked Defendant's Exhibit A, the advice of credit dated November 15, 1948, relating to said six checks. Said exhibit has been misplaced and cannot be located by the Clerk of the Court. It is therefore stipulated that the photostats of the front and back of said advice of credit attached hereto and marked Exhibit A are true copies of the front and back of said advice of credit and that said photostat copies is hereby substituted for and may be used in lieu of said original Exhibit A.

Dated November 9, 1950.

/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON,

/s/ THOMAS P. RIORDAN,

RIORDAN, LINKLATER &
BUTLER,

Attorneys for Plaintiff.

/s/ MORSE ERSKINE,

ERSKINE, PILLSBURY &
TULLEY,

Attorneys for Defendant.

Lofendo, Frank C.

Com'l

The undersigned depositor agrees with Bank of America that no account is to be carried by said bank as a COMMERCIAL SAVINGS account and all funds which the undersigned depositor has or may have on deposit therein with said bank shall be governed by its By-Laws, all future amendments thereto, all regulations passed or hereafter to be passed by its Board of Directors pursuant to said By-Laws, and by all rules and practices of said bank relating thereto including interest, service charges, etc.

Sign Mr. Frank C. Lofendo
 Name Bakersfield Inn
 Street Bakersfield Telephone 5-5951
 Address Bakersfield
 City Bakersfield
 Business or Occupation Business Birthplace Chicago
 Father's Name Peter Mother's Maiden Name Anna Kuhn
 Introduced by John J. Togni Bank Reference

Open Date 4-19-48 Close Date 4-19-48 Account No. 500
 Acct. 1/1/48 Aver. 30 per cent Sol. 30 per cent Reason and 2400
 TEL-1901-A ACCRIDATE CARD INDIVIDUAL OR INDIVIDUAL TRUSTEE

Authorization for delivery or mailing of statements and cancelled checks and of reported amounts, and for monthly service charge, etc., and agreement requiring examination of cancelled checks and statements.

Frank C. Lofendo 5-5951
 Bakersfield Inn LA 8-5555
 ADDRESS PHONE 5-1744

To BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

You are hereby requested to make disposition of statements and cancelled checks of the account of the undersigned as indicated in the check mark below:

- The undersigned will call for his statements and cancelled returns within fifteen days after they are ready for delivery. If not called for within such time, you may at your option, but you shall not be required to, either deliver them by messenger or deposit them with the U. S. Mail, one registered, postage prepaid, addressed to the undersigned at the above address.
- The undersigned requests you to deliver by messenger, or deposit with the U. S. Mail, one registered, postage prepaid all statements and cancelled checks of the account of the undersigned at the above address.

It is agreed that all responsibility for loss in transit of statements and cancelled returns delivered by messenger or deposited with the U. S. Mail is assumed by the undersigned. The undersigned hereby agrees to examine carefully all cancelled you hear, statements and to notify the bank of any error, and to make any claim for credit or refund within ten days from the date of the statement. If the bank fails to make a prompt examination of statements and cancelled returns, or in any other event not later than ten days after actual receipt of cancelled returns and statements, no matter how obtained, claim for credit or refund shall not be made after the expiration of such respective periods.

You are authorized without any responsibility on your part for loss in transit, to return any and all checks which the undersigned may deposit, or return any and all statements and cancelled returns to the undersigned, at the above address by messenger, or by deposit with the U. S. Mail, one registered, postage prepaid.

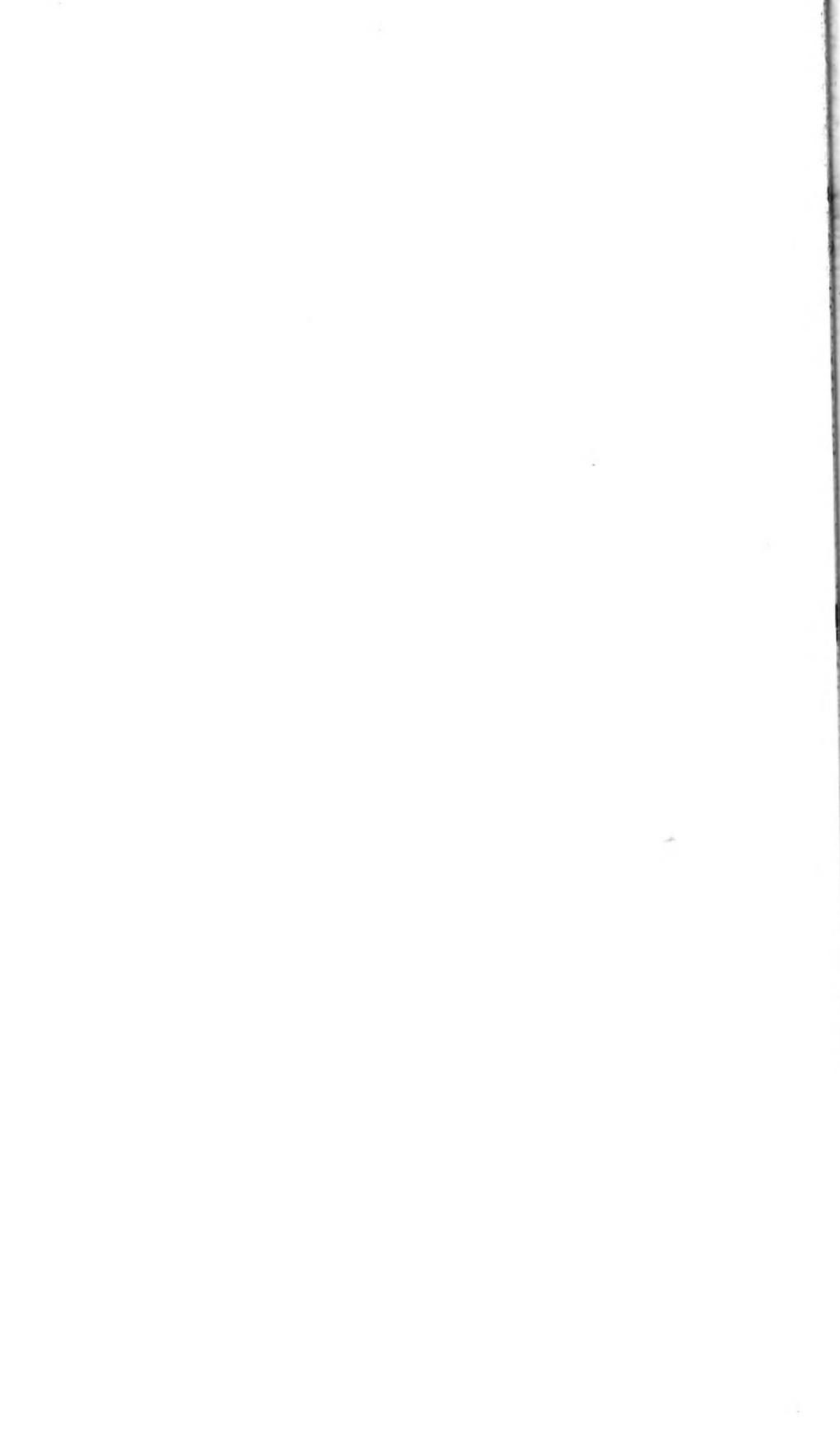
You are further authorized in accordance with the rules of the bank, to deduct from the amount of the undersigned a monthly service charge for each month, and a sum for checks returned because of insufficient funds.

N.B. PLEASE READ
CAREFULLY BEFORE SIGNING

TEL-112 1245

(Signature)

(Signature)



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EXHIBIT A

MERCHANDISE NATIONAL BANK
CHICAGO, ILLINOIS

No. 6961

Date	Owners	Documents	Date of Item	Due	Amount
11-15-48	Bank of America NY & SA Bakersfield, California	5 drafts - Frank C. Lofemic <i>RECEIVED IN PROTECTION OF CREDITORS</i>	11-6-48	Sight	113,216. Total
				NO PROTEST	113,216. Coll. Fee Total

113,216.
WE RETURN the above described item unpaid.

MERCHANDISE NATIONAL BANK
CHICAGO, ILLINOIS

Ref b 10ie



[Endorsed]: Filed November 9, 1950.



[Title of District Court and Cause.]

ORDER

It Is Ordered and this does order that the motion of defendant to strike the amended complaint of plaintiff is denied.

Dated this 14th day of May, 1951.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed May 17, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried on June 15, 16, 19, 20, 21, 22, 23, 24, 26 and 29, 1950, before the Honorable William D. Murray, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That at all times herein mentioned plaintiff Merchandise National Bank of Chicago was and is a

national banking association organized and existing under the laws of the United States, located in the State of Illinois, and having its principal place of business in Chicago, Illinois.

II.

That at all times herein mentioned defendant Bank of America National Trust and Savings Association was and is a national banking association organized and existing under the laws of the United States, located in the State of California, with its head office and principal place of business in San Francisco, California, in the Northern District of California wherein it resides and is doing business.

III.

That within the meaning of Section 1348 of Title 28, United States Code, at all times herein mentioned the plaintiff was and is a citizen of the State of Illinois, and defendant was and is a citizen of the State of California; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

IV.

That throughout the year 1948 plaintiff had a deposit account with the defendant with a large credit balance in plaintiff's favor; that during the existence of that account, defendant from time to time sent to plaintiff for collection checks drawn upon the plaintiff; that in such cases, defendant was authorized by plaintiff to charge plaintiff's said

account with the amount of the checks, and would so charge the account only upon actual receipt from the plaintiff of a written authorization to do so, in the form of an outstanding and unrevoked credit memorandum or advice of credit; that this was the uniform custom, practice and arrangement between plaintiff and defendant and was observed by defendant at all times until November 19, 1948.

V.

That in 1948 to and through the month of November, a corporation named United Produce Company had an account with the plaintiff.

VI.

That on November 19, 1948, and for several months prior to that date United Produce Company had an account with defendant at its East Bakersfield Branch in Bakersfield, California (hereafter referred to as defendant's branch); that United Produce Company maintained that account in the name of "Frank C. Lofendo" (hereinafter referred to as "Lofendo"), but the account was in fact an account of United Produce Company, although maintained in the name of "Lofendo"; that it will hereafter be referred to as the "Lofendo account," but only for convenience.

VII.

That from time to time United Produce Company drew checks on its account with the plaintiff payable to "Lofendo," endorsed them with the name of "Lofendo" and delivered them to defendant's

branch, and they were sometimes received for deposit in its account, the so-called "Lofendo account," and sometimes for collection; that while the payee on those checks was designated "Frank C. Lofendo," United Produce Company was in fact the payee using the name "Lofendo" to designate itself; that from time to time United Produce Company drew checks on its said "Lofendo account" at defendant's branch payable to itself under the designation "United Produce Co." and delivered them to the plaintiff for deposit to its account with plaintiff or for collection; that upon delivering such checks to plaintiff for collection, United Produce Company falsely represented to plaintiff that the checks were actual remittances from a natural person named "Lofendo," that "Lofendo" was a debtor of United Produce Company, and that the checks were payments received by United Produce Company from Frank C. Lofendo on account of debts owing to it from him arising from the sale of produce; that the purpose of United Produce Company in maintaining the "Lofendo account" and in drawing checks on its two accounts in the manner just stated was to cheat and defraud plaintiff; that while at all times referred to in these findings there was a natural person named Frank C. Lofendo, that person had no interest or claim in said "Lofendo account" or in any checks drawn by United Produce Company on the plaintiff payable to "Frank C. Lofendo" or in any of their proceeds.

VIII.

That United Produce Company's account with plaintiff was maintained under several writings which together constituted an agreement defining the terms of the relationship between United Produce Company and plaintiff; that under that agreement checks received by plaintiff from United Produce Company drawn on the "Lofendo account" and represented to be remittances from "Lofendo" were received for collection only, and conditional credits in the amount of the checks were entered in the United Produce Company account with plaintiff subject to charge-back at any time before actual collection of the funds.

IX.

That between November 4 and November 12, 1948, plaintiff received from United Produce Company over \$500,000 of checks drawn by United Produce Company on its "Lofendo account" with defendant, as stated above, and conditional credits had been entered in United Produce Company's account with plaintiff as a result thereof; that such checks were in fact fraudulent, and there were no funds in defendant's branch, on which they were drawn, to meet them, as United Produce Company well knew; that concurrently United Produce Company was obtaining credits from the plaintiff on the basis of assignments as collateral of fictitious and non-existent accounts receivable under the fraudulent representation that they were actual accounts due to United Produce Company from debtors as the result of sales of merchandise.

X.

That on November 12, 1948, and on November 15, 1948, as a result of the foregoing frauds perpetrated by United Produce Company on plaintiff, there was an apparent credit balance on the face of United Produce Company's account with plaintiff, but in fact there was no actual credit balance on November 12th or at any time thereafter and instead there was an overdraft of over \$500,000.

XI.

That under date of November 8, 1948, United Produce Company drew a certain 6 checks on its account with plaintiff payable to itself under the name of "Lofendo," totaling \$113,216.50; that on November 13, 1948, United Produce Company presented these checks to defendant's branch; that defendant declined to receive the checks for deposit or to give credit thereon to the "Lofendo" account and did not do so; that instead, it accepted the checks only as agent for collection; that on the same day, November 13, 1948, defendant mailed the 6 checks by a "collection letter" to the plaintiff for collection.

XII.

That said 6 checks and collection letter arrived at the plaintiff's offices on November 15, 1948; that they never were in fact paid or collected; that United Produce Company did not then or thereafter or at any time in November, 1948, have any funds in the account with which to pay the 6 checks or against which they could be collected.

XIII.

That when the 6 checks for \$113,216.50 arrived at plaintiff's office on November 15, 1948, employees of plaintiff, deceived and misled by reason of the facts found above and the fraud perpetrated by United Produce Company, and acting under the mistaken belief that there were funds in the account sufficient to pay the checks, marked the 6 checks "paid," made bookkeeping entries on plaintiff's own books to record the occurrences, and mailed to the defendant a written paper called an "advice of credit" to the effect that the 6 checks had been collected; that plaintiff did not notify United Produce Company of the occurrence and never surrendered the 6 checks to it.

XIV.

That on November 17, 1948, plaintiff discovered the fraud that United Produce Company had perpetrated on it and the fact that United Produce Company's account was without funds on November 15th with which to pay the 6 checks, and it discovered the mistake committed on November 15, 1948, in sending out the advice of credit, marking the checks paid, and in making the several bookkeeping entries referred to above; that thereupon, on that day, plaintiff telephoned to defendant and informed the defendant that the advice of credit had been sent out by mistake and as a result of a fraud perpetrated by United Produce Company; that plaintiff further advised defendant that the checks had

in fact not been collected or paid and that United Produce Company had defrauded the plaintiff of a very large sum of money; that at the time of the telephone conversation the defendant had not yet received the advice of credit and did not know that it had been sent out; that in that conversation plaintiff inquired whether the advice of credit had been received, was informed by defendant that it had not, and plaintiff thereupon informed defendant that the advice of credit was rescinded and revoked, and in the said telephone conversation, the defendant agreed with plaintiff not to act upon the advice of credit if and when it should thereafter be received by defendant and agreed to return it to an emissary of plaintiff; that defendant did not know until November 22, 1948, that the 6 checks had been stamped paid, and it never knew until after the present lawsuit had been instituted that bookkeeping entries had occurred at the plaintiff's offices on November 15, 1948, with respect to the 6 checks; but on November 17, 1948, it inferred from the information that the advice of credit had been sent out by mistake, that the checks had been marked "paid" and that various bookkeeping entries had occurred at plaintiff's offices on November 15th.

XV.

That on the next day, November 18, 1948, an officer of the plaintiff fully empowered to act for it arrived at defendant's head office and both orally and in writing advised defendant that the 6 checks had not been collected, that the advice of credit had

been sent out by mistake, that it was rescinded and revoked, and that the plaintiff rescinded any authority to the defendant to make any charge to plaintiff's account with defendant in reliance on the advice of credit when and if received; that on the same day defendant agreed that it would not act upon the advice of credit when received, that it would return the advice of credit to plaintiff, and that plaintiff should return the 6 checks to defendant; that on the same day plaintiff again advised defendant orally and in writing that United Produce Company had defrauded plaintiff of a sum in excess of \$500,000 by the means and instrumentality of fraudulent and fictitious checks drawn by United Produce Company on the account maintained at defendant's branch in the name of Frank C. Lofendo, and that Lofendo was a participant in the fraud.

XVI.

That on the next day, November 19, 1948, plaintiff returned to the defendant the 6 checks after marking them with the notation "Cancelled in Error," and it reversed the various bookkeeping entries that had been made on November 15, 1948, on its own books relative thereto.

XVII.

That defendant did not receive the advice of credit relative to the 6 checks for \$113,216.50 until November 19th; that not until subsequently, as hereafter found, did the defendant give or enter any credit for any part of the 6 checks or the \$113,216.50

to the "Lofendo account"; that at no time did the defendant in any way take any action whatsoever in reliance on the advice of credit relative to the 6 checks or in reliance on the supposed collection or payment of the said checks, and in no way at any time did it ever change its position or suffer any prejudice in reliance on any supposition that the said 6 checks or any of them had been collected or paid.

XVIII.

That at no time did defendant give anything of value to anyone for the said 6 checks or any of them or any part thereof.

XIX.

That despite the revocation and rescission of the advice of credit relative to the 6 checks, and despite defendant's agreement not to act on the advice of credit when received but to return it to the plaintiff, all as found above, defendant on November 20, 1948, after receiving the advice of credit on November 19, 1948, purported, as of the end of the day on November 19th, to charge the plaintiff's deposit account with the sum of \$113,216.50 and to credit a like amount to the "Lofendo account"; that the said charge against the account of the plaintiff was made without any authority from plaintiff to do so, contrary to plaintiff's instructions already received by defendant and already agreed to by it, and without any legal right, and it was wholly insufficient to reduce the defendant's indebtedness to the plaintiff by any amount whatever; that on November 20th

as of November 19th, defendant made entries on its own records purporting to show collection and payment of the 6 checks for \$113,216.50 as of November 19, 1948.

XX.

That as early as October 22, 1948, defendant became suspicious that the "Lofendo account" at its branch was being maintained and operated as part of a check kiting operation with United Produce Company; that on that day it gave instructions to its employees that thereafter they were not to accept for immediate credit any checks drawn by United Produce Company to the order of "Lofendo" but were to accept any such checks for collection only, were to give credit only when collection was actually effected and had become final by receipt of good funds, and were not to permit "Lofendo" to draw against any items until so collected; that defendant did not fully observe these instructions until November 10, 1948; that on November 10, 1948, defendant became positive that the transactions going on between "Lofendo" and United Produce Company were not ethical but were part of some dishonest scheme; that on that day defendant reiterated imperative instructions that no checks of United Produce Company drawn to the order of "Lofendo" and tendered to defendant for deposit in the "Lofendo account" were to be accepted for immediate credit, that they were to be accepted by the defendant as agent for collection only, that no credit was to be given to the "Lofendo account" until final collection of the checks was actually effected and good funds

received, and that no withdrawals were to be permitted against any items until such collection; that at the time of the issuance of these instructions on October 22, 1948, and again on November 10, 1948, defendant had a substantial collected balance in the "Lofendo account," had permitted no overdrafts on the account, had paid out no funds against any apparent but as yet uncollected balance, and it had sustained no loss by reason of anything which had theretofore happened.

XXI.

That subsequent to said instructions of November 10, 1948, and on November 16, 1948, United Produce Company presented to the defendant at its branch 5 checks totaling \$97,207.00 drawn by United Produce Company to the order of "Lofendo"; that contrary to its own instructions, defendant negligently and carelessly entered an immediate credit to the "Lofendo account" in the sum of \$97,207.00, as of November 15th, and immediately on the same day honored checks drawn by United Produce Company (using the name of Lofendo) on the said account and paid out funds in the amount of \$109,569.15; that immediately prior to the charge of \$109,569.15 there stood to the credit of the account only \$13,061.17 of collected funds, plus the credit of \$97,207.00 of uncollected funds; that the defendant thus paid out \$96,507.98 against uncollected funds.

XXII.

That upon receipt by the defendant of the said checks for \$97,207.00, it sent them by a cash letter

to its Chicago correspondent, Continental Illinois National Bank and Trust Company; that late on November 18, 1948, after the close of business, and after it had already agreed with plaintiff to return the advice of credit for \$113,216.50 when received, the defendant received word by telegram from Continental Illinois National Bank and Trust Company that the checks for \$97,207.00 had been rejected for lack of funds; that upon receiving this telegram the defendant examined its records, and its officers then learned that by reason of the negligence of its own employees it had given immediate credit to the "Lofendo account" for \$97,207.00 on November 15, 1948, had on that day immediately honored checks against that credit as stated above, and that there were insufficient funds in the "Lofendo account" to cover a charge back of the rejected checks for \$97,207.00; that defendant thereby learned that it had sustained a large loss.

XXIII.

That defendant's said loss was in no way connected with the 6 checks for \$113,216.50 or anything that had occurred with respect to those 6 checks either at the defendant's offices or at the plaintiff's offices or with anything that had been done relative thereto by the plaintiff or the defendant; that the loss was the sole and proximate result of defendant's own carelessness and negligence, as aforesaid.

XXIV.

That defendant, ignoring plaintiff's revocation

and rescission of the advice of credit relating to the \$113,216.50, violating its agreement with plaintiff not to act upon the advice of credit when received but to return it, and seizing advantage of the advice of credit which had finally arrived on November 19, 1948, charged the account of plaintiff in the sum of \$113,216.50 and credited that sum to the "Lofendo account," and concurrently charged the "Lofendo account" in the sum of \$97,207.00, all for its own benefit.

XXV.

That under date of November 6, 1948, United Produce Company drew 4 checks on its account with plaintiff payable to itself, under the name of "Lofendo," totaling \$89,813.10; that on November 10, 1948, United Produce Company presented these checks to the defendant at its branch; that pursuant to the instructions which defendant had laid down on that day, it refused to accept these checks for deposit to the account of "Lofendo" or to give credit for them to the "Lofendo account" and did not do so; that instead it accepted the checks only as agent for collection; that on the same day defendant mailed the four checks by a collection letter to plaintiff for collection; that the four checks and the collection letter covering them arrived at the plaintiff's offices on November 12, 1948; that United Produce Company did not have on that day or at any time thereafter any funds in its account with the plaintiff with which to pay said checks or against which they could be collected, but by reason of the frauds perpetrated by United Produce Company

on plaintiff, as found in Paragraphs VII to X, inclusive, above, there was an apparent credit balance in said account; that on November 12, 1948, employees of plaintiff, deceived and misled by reason of the facts found above and the fraud perpetrated by United Produce Company, and acting under the mistaken belief that there were funds in the account sufficient to pay the four checks, mailed to the defendant an advice of credit to the effect that the four checks for \$89,813.10 had been collected; that thereafter, on November 17, 1948, when the plaintiff telephoned to the defendant as found in Paragraph XIV above, defendant stated to plaintiff that only two collection letters theretofore sent by defendant's branch to the plaintiff were outstanding; one for the \$113,216.50 and a later one for \$52,379.00, and that there was a balance of only \$699.02 in the "Lofendo account"; that plaintiff reasonably assumed from this statement that the advice of credit for \$89,813.10 had already been received and acted upon by the defendant and that in reliance thereon the defendant had changed its position; that consequently, neither then or on November 18, 1948, did plaintiff speak or write to defendant relative to the \$89,813.10; but in fact, at the time of said telephone conversation the advice of credit for \$89,813.10 had not yet been acted upon by defendant in any way whatsoever; that defendant did not at any time, either theretofore or thereafter, change its position in any way to its detriment in reliance upon said advice of credit; that the said advice of credit had been received by the defendant on No-

vember 16, 1948, but it was not acted upon until November 18, 1948, and then only in the circumstances found below in Paragraphs XXVI, XXVII and XXVIII.

XXVI.

That on November 15, 1948, three checks drawn on the "Lofendo account" totaling \$75,586.86 arrived at defendant's branch under cover of cash letters; that at the time of arrival, there were not sufficient funds in the account to pay them, but defendant's employees negligently failed to reject the checks; that on November 16, 1948, the posting to the "Lofendo account" as of November 15, 1948, of the checks for \$97,207.00, referred to in Paragraph XXI above, created an apparent balance against which the checks for \$75,586.86 could have then been charged; that had this charge been made, the apparent credit balance in the account would have been reduced so that there would have been no balance, even apparent, against which defendant could have honored the checks for \$109,569.15 received on November 16, 1948, as stated in Paragraph XXI above, and it would not have done so; but defendant failed to charge the checks for \$75,586.86 against the "Lofendo account" and permitted them to continue to lie around its branch.

XXVII.

That the advice of credit relative to the checks for \$89,813.10 arrived at defendant's branch, after the charge for \$109,569.15 had been made; that three

days later, on November 19, 1948, defendant charged the sum of \$89,813.10 against plaintiff's deposit account with it, and on November 18, 1948, it entered a credit to the "Lofendo account" for \$89,-813.10; that defendant predicated the charge against plaintiff's account as of November 18, 1948, and it predicated the credit to the "Lofendo account" as of November 17, 1948; that until that credit was so entered, there were not sufficient funds in the "Lofendo account" against which to charge the checks for \$75,586.86 which had theretofore been paid, and the purpose of making the entry was to supply funds against which to make the charge; that thereupon the checks for \$75,586.86 were charged against the credit so created in the account.

XXVIII.

That before anything was done by the defendant on the basis of said advice of credit for \$89,813.10, plaintiff had communicated with defendant on November 17, 1948, as found above in Paragraph XIV, and again on November 18th, as found above in Paragraph XV, and the plaintiff on both occasions informed the defendant that United Produce Company had defrauded the plaintiff of a large sum of money exceeding \$500,000 and had done so by means of fictitious and fraudulent checks drawn on the "Lofendo account"; that consequently, defendant never became a bona fide purchaser for value of the \$89,813.10 or any part thereof; that not until the trial of this cause did plaintiff discover that defendant was not a bona fide purchaser for value of

said sum and that it had never changed its position to its detriment in reliance on the said advice of credit for \$89,813.10; that thereupon the court granted leave to plaintiff to amend its complaint, and plaintiff did amend its complaint to seek recovery of said sum.

XXIX.

That it is not true that plaintiff at any time permitted or allowed United Produce Company to incur obligations to it, not falling within the exceptions enumerated in Revised Stats., Sec. 5200 (Title 12, U. S. C., Section 84), in excess of 10% of the amount of plaintiff's capital stock actually paid in and unimpaired plus 10% of its unimpaired surplus; that it is not true that any act of plaintiff in allowing United Produce Company to incur obligations of any kind to it or anything else ever done or omitted by plaintiff in any way proximately caused or contributed to any loss sustained by the defendant in any amount whatever; that it is not true that the defendant, or plaintiff, or anyone else, has ever suffered any loss by reason of the 6 checks for \$113,216.50; that the plaintiff has been damaged by reason of defendant's refusal to pay to plaintiff the balance in plaintiff's account with defendant, and one of defendant's reasons for refusing to pay to plaintiff the amount of the balance was that defendant was entitled to charge the sum of \$113,216.50 against plaintiff's account; but no one has suffered any loss by reason of the 6 checks for \$113,216.50, since the defendant paid out no funds and did no act in any way to its detriment in reliance on said

6 checks or anything connected therewith; that it is not true that the plaintiff ever made any representation to the defendant to induce it to pay any check or checks drawn on the "Lofendo account" to the order of United Produce Company or to induce the defendant to give anyone whatsoever credit for any check or checks drawn by United Produce Company on the plaintiff payable to "Lofendo" or to anyone else; that it is not true that, in reliance on any representation of the plaintiff, defendant ever paid any checks drawn on the "Lofendo account" or ever gave the "Lofendo account" credit for checks of United Produce Company.

XXX.

That on November 23, 1948, plaintiff made demand on defendant to pay to the plaintiff the entire amount of the credit balance in plaintiff's account with defendant; that at that time the account had a credit balance of \$386,577.61; that between November 23, 1948, and February 18, 1949, defendant paid to plaintiff \$294.54, and on February 18, 1949, it paid to plaintiff the sum of \$183,235.47; but that defendant has failed and refused and still fails and refuses to pay to plaintiff any other sum, and there is still due, owing and unpaid to plaintiff the principal sum of \$203,047.60; that defendant is further indebted to plaintiff for interest at the legal rate of 7% per annum on the sum of \$183,235.47 from November 23, 1948, to and including February 18, 1949, and for interest at the legal rate on \$203,047.60 from November 23, 1948, until paid.

From the foregoing facts the Court draws the following

Conclusions of Law

I.

That this Court has jurisdiction hereof.

II.

That plaintiff and defendant were the agents of “Lofendo” in effecting collection of the checks forwarded for collection.

III.

That the bookkeeping entries of plaintiff did not constitute payment of checks sent for collection.

IV.

That the rescinded and cancelled advice of credit is not and cannot be the basis for credit, claim, charge or set-off by defendant against plaintiff.

V.

That defendant never acted to its detriment in reliance upon the rescinded and cancelled advice of credit.

VI.

That defendant did not become a debtor of “Lofendo” in connection with the 6 checks totaling \$113,216.50, or the 4 checks totaling \$89,813.10.

VII.

That defendant’s charge of \$113,216.50 against the account of plaintiff was made without authority or

right and did not reduce defendant's indebtedness to plaintiff.

VIII.

That after the 17th day of November, 1948, defendant had no authority or right to pay to "Lofendo" or itself, in discharge of any obligation of "Lofendo" to it, the sum of \$89,813.10.

IX.

That in connection with the collection of the checks, defendant, not having acted in reliance on any act or omission of plaintiff, could not have any greater rights than its principal "Lofendo."

X.

That defendant is indebted to plaintiff in the sum of \$203,047.60, plus \$3,069.50 interest on the sum of \$183,235.47, from November 23, 1948, to and including February 18, 1949, together with an additional sum as interest at the rate of 7% per annum on \$203,047.60 from November 23, 1948, until paid, and on \$3,069.50 from February 18, 1949, until paid, together with its costs of suit herein incurred.

XI.

That upon agreement of counsel, plaintiff having prevailed in its action, there does not exist any fund or balance in the "Lofendo account" to which the trustee in bankruptcy would be entitled and therefore the so-called interpleader counterclaim of defendant and the trustee's answer and claim in response thereto should be dismissed.

Let a form of judgment be accordingly prepared and submitted to the Court for approval.

Done and dated this 14th day of May, 1951.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed May 17, 1951.

In the District Court of the United States, for the Northern District of California, Southern Division

No. 28721-R

MERCHANDISE NATIONAL BANK OF CHICAGO, a National Banking Association,

Plaintiff,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association,

Defendant.

JUDGMENT

The above-entitled cause having been tried on June 15, 16, 19, 20, 21, 22, 23, 24, 26 and 29, 1950, before the Honorable William D. Murray, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and

considered the briefs of the parties, and having made and filed herein its Findings of Fact and Conclusions of Law pursuant to R.C.P. Rule 52,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff, Merchandise National Bank of Chicago, a national banking association, do have and recover of and from defendant, Bank of America National Trust and Savings Association, a national banking association, the sum of Two Hundred Six Thousand One Hundred Seventeen and 10/100 Dollars (\$206,117.10), plus interest at the rate of seven per cent (7%) per annum on Three Thousand Sixty-Nine and 50/100 Dollars (\$3,069.50) thereof from February 18, 1949, to and including the day of entry of this judgment, plus, also, interest at the rate of seven per cent (7%) per annum on Two Hundred Three Thousand Forty-Seven and 60/100 Dollars (\$203,047.60) thereof from November 23, 1948, to and including the day of entry of this judgment, together with plaintiff's costs of suit herein incurred to be taxed in the manner provided by law and the rules of court, the entire judgment to bear interest from the date of entry at the rate of seven per cent (7%) per annum until paid, and plaintiff shall have execution therefor;

It Is Further Ordered, Adjudged and Decreed that the defendant, Bank of America National Trust and Savings Association, do have and recover nothing from the plaintiff by reason of said defendant's counterclaims or any of them;

It Is Further Ordered, Adjudged and Decreed that the interpleader counterclaim of said defendant,

Bank of America National Trust and Savings Association, and the claim and response thereto of the interpleaded defendant, Eugene J. O'Riley as Trustee in Bankruptcy of the Estate of United Produce Company, a corporation, Bankrupt, be and the same are hereby dismissed, together with the answer of said interpleaded defendant to the complaint and its reply to said interpleader counterclaim.

Done and dated this 6th day of June, 1951.

/s/ W. D. MURRAY,

United States District Judge.

Approved as to form pursuant to Rule 5(d) of the local rules.

S. B. STEWART, JR.,

G. D. SCHILLING,

ERSKINE, PILLSBURY &
TULLEY,

By /s/ MORSE ERSKINE,

Attorneys for Defendant Bank of America National
Trust and Savings Association.

/s/ JOHN L. BRADLEY,

CRIMMINS, KENT, DRAPER &
BRADLEY,

Attorneys for Interpleaded Defendant Eugene J.
O'Riley as Trustee, etc.

Costs taxed \$1,573.14, June 14, 1951.

Receipt of copy acknowledged.

Entered June 8, 1951.

[Endorsed]: Filed June 8, 1951.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Attached Note]: We respectfully request that the preparation of these proposed findings on the assumption that defendant's motion to strike the amended complaint will not be granted will be without prejudice to defendant's contention that such motion should be granted.

/s/ MORSE ERSKINE.

The above-entitled cause having been tried on June 15th, 16th, 19th, 20th, 21st, 22nd, 23rd, 24th, 26th and 29th, 1950, before the Honorable William D. Murray, District Judge, sitting without a jury, and the court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, the Court now makes the following

Findings of Fact

I.

Introductory Findings

1. At all times herein mentioned plaintiff, Merchandise National Bank of Chicago, was and is a national banking association organized and existing under the laws of the United States, located in the State of Illinois, and having its principal place of business in Chicago, Illinois.

2. At all times herein mentioned defendant, Bank of America National Trust and Savings Association was and is a national banking association organized and existing under the laws of the United States, located in the State of California, with its head office and principal place of business in San Francisco, California, in the Northern District of California, wherein it resides and is doing business. Defendant has branches throughout the State of California, one of which is located in Bakersfield, California, and is known as the East Bakersfield Branch of defendant. This East Bakersfield Branch of defendant will be referred to as "the branch."

3. Within the meaning of Section 1348 of Title 28, USC, at all times herein mentioned the plaintiff was and is a citizen of the State of Illinois, and defendant was and is a citizen of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

4. On November 19th, 1948, and for more than five months prior to that date United Produce Company, hereinafter referred to as "United," was a corporation with its principal place of business in Chicago, Illinois, engaged in the business of a commission merchant, that is in the business of buying at wholesale vegetables, fruit and other produce and selling such produce to wholesale and retail distributors. And for a period of at least five months prior to November 19th, 1948, Frank C. Lofendo was an agent of United employed by it to purchase

from producers for its account vegetables, fruit and other produce.

5. The period commencing on July 1st, 1948, and continuing to November 19th, 1948, will for convenience be referred to herein at times as "said period." During the said period United had a commercial account with plaintiff, and plaintiff was loaning United \$200,000.00 secured by assignments by United to plaintiff of all the former's accounts receivable, and plaintiff was discounting drafts drawn by United on others. This loan by plaintiff to United was the legal limit which plaintiff under section 84 Title 12 USC could lend to any one person.

6. During said period there was a commercial account in the branch standing in the name of Lofendo.

7. During said period United and Lofendo were engaged in what is known in the banking business as "check kiting." The practice of check kiting, in which, as just stated, United and Lofendo were engaged during said period, can be described as follows: Lofendo, as the agent and tool of United, would draw a check upon the branch, and would deliver such check to United so that United could deposit it to its account with plaintiff. Plaintiff upon the deposit of such check with it would credit the account of United with plaintiff with the amount of such check. Contemporaneously, United would draw a check payable to Lofendo on its account with plaintiff and would cause such check to be deposited to the credit of Lofendo in said account

of Lofendo with the branch within such time so that when such check of Lofendo drawn to the order of United was presented to the branch for payment, there would be funds to his credit in the branch to pay it. One side of the kiting operation was the side in which checks of Lofendo drawn to the order of United, like the check of Lofendo just mentioned, were deposited to the credit of United in its said account with plaintiff; and the other side of the kiting operation was the side in which checks of United drawn to the order of Lofendo, like the check of United just mentioned, were deposited to the credit of Lofendo in his said account with defendant. In the kiting operation many checks during said period were used on both sides, that is many checks drawn by Lofendo on his account with the branch to the order of United were deposited in and credited to the account of United with plaintiff and many checks drawn by United on its account with the plaintiff to the order of Lofendo were deposited in and credited to the account of Lofendo with the branch. And as will be stated later United also used its loan account with plaintiff to carry on the kite.

8. Throughout the year 1948, plaintiff had a deposit account with defendant with a credit balance therein in favor of plaintiff. By its original complaint on file in this action plaintiff claimed that at the close of business on November 23rd, 1948, the credit balance in said account in its favor was \$296,-451.97, whereas, by its amended answer on file in this action defendant claims that as of the close of

business on that date the credit balance in said account in plaintiff's favor was the sum of \$183,235.47. The difference between these amounts is \$113,216.50, which difference was represented by six checks, hereinafter referred to as "the six checks," payable to Lofendo and drawn by United on its commercial account with United. On November 13th, 1948, the branch received from Lofendo through the mail the six checks for deposit, and on that date the branch mailed them to plaintiff with a collection letter instructing plaintiff to credit the account of defendant and notify the branch. (As all of the events hereafter referred to in these findings occurred in 1948 the court in hereafter stating dates in these findings will not specify the year but only the month and day; but it should be understood that all the dates herein after specified are dates in 1948.) One of the main issues in this case is whether plaintiff paid the six checks and if plaintiff paid them whether it has the right to recover such payment from defendant.

9. By its amended complaint filed by plaintiff at the conclusion of the trial, plaintiff claimed that at the close of business on November 23rd, 1948, the amount to its credit in its account with defendant was not \$296,451.97, as claimed by the original complaint, but was \$386,283.07. The difference between these two last amounts is \$89,831.10, which was represented by four check, hereinafter referred to as "the four checks," drawn by United on plaintiff, payable to Lofendo. On November 10th, 1948,

the branch received from Lofendo through the mail the four checks for deposit and on that day the branch mailed them to plaintiff with a collection letter instructing the plaintiff to credit the account of defendant and notify the branch. The second main issue in the case is whether plaintiff paid the four checks and if it paid them, whether it has the right to recover such payment from defendant.

II.

Plaintiff Paid Both the Six Checks and the Four Checks and When It Paid Them Defendant's Agency to Present and Collect Them Terminated and Plaintiff Became Indebted to Defendant and Defendant to Lofendo for the Amount of Them.

10. Plaintiff received the four checks, together with the collection letter accompanying them, on November 12th; and on that date plaintiff paid the four checks by charging them against the United's commercial account, crediting defendant with the amount of the four checks on plaintiff's books as requested by the collection letter and by perforating the checks with the stamp "paid" and the date of November 12th, and on that date it mailed the branch four instruments each of which referred to one of the four checks and bore plaintiff's stamp to the effect that the check referred to therein had been paid on November 12th. The last mentioned instruments, which will be referred to herein as "advices of credit," were received by the branch on November 16th.

11. Plaintiff received the six checks, together with the letter accompanying them, on November 15th; and on that date it paid them by charging them against United's commercial account and by crediting defendant on its books with the amount of the six checks as requested by the collection letter and by perforating the checks with the stamp "paid" and the date of November 15th. Although the collection letter accompanying the six checks requested plaintiff to mail to the branch an advice that the six checks had been paid, plaintiff on November 15th mailed to the San Francisco head office of defendant an instrument which referred to the six checks and bore plaintiff's stamp to the effect that the checks referred to therein had been paid on November 15th. The last mentioned instrument will also be referred to herein as an "advice of credit." The last mentioned advice of credit was received at the San Francisco head office of defendant on November 18th, but that department of defendant had no function to perform with respect to it other than to treat it as a misrouted item and forward it by mail to the branch where the collection had originated. This was done as a matter of routine by the clerical staff. The last mentioned advice of credit arrived at the branch on November 19th.

12. When the branch received the four checks and the six checks through the mail for deposit and elected to send them to plaintiff for collection instead of crediting the amount thereof to Lofendo's account, defendant became an agent of Lofendo for

the presentaiton and collection of both sets of checks. When Plaintiff paid the four checks and credited defendant with the amount thereof, the agency of defendant to present and collect the four checks was thereupon terminated and plaintiff thereupon became indebted to defendant for the amount of the four checks and defendant thereupon became indebted to Lofendo for the amount thereof; and when plaintiff paid the six checks and credited defendant with the amount thereof, the agency of defendant to present and collect the six checks was thereupon terminated and plaintiff thereupon became indebted to defendant for the amount of the six checks and defendant thereupon became indebted to Lofendo for the amount thereof.

III.

Plaintiff Was Negligent In not Having Discovered the Kite Long Prior to Its Payment of the Four and Six Checks.

13. The arrangement under which United carried on its business with plaintiff was substantially as follows: When on any day United had in its hands checks of debtors owing it accounts receivable assigned to plaintiff as security for plaintiff's loan to United, United would endorse such checks and deliver them to plaintiff together with a remittance sheet specifying the debtors who had delivered such checks to it and the amount of such checks. Plaintiff would thereupon apply such remittance (that is the aggregate amount of such checks) on account of United's indebtedness to it and on the same day

plaintiff would make an additional loan to United in the amount of such remittance so as to maintain United's indebtedness to it at \$200,000.00. Although plaintiff made United a new loan on each day that a remittance was received and applied on account of United's indebtedness the remittance was not a basis for such new loan, but such new loan was an independent transaction based on a new note and secured by new collateral consisting in the assignment of new accounts receivable.

14. When in these findings the expression, "checks on both sides of United's commercial account," is used it shall refer to checks drawn by Lofendo on his account with the branch payable to the order of United which were credited to United's commercial account with plaintiff and to checks drawn by United on its commercial account with plaintiff payable to the order of Lofendo which were charged against United's commercial account. Defendant's exhibit PP, which is a photostat of United's commercial account with plaintiff for the period commencing on July 1st to November 27th when the account was closed, shows that from July 1st to the end of October there were on many days checks on both sides of United's commercial account.

15. During the period (as stated in paragraph 5 the expression "said period," as used in these findings means the period from July 1st to November 19) Henry J. Reichwein was the cashier and vice-president of plaintiff and was the loan officer of plaintiff in charge of its business transactions with

the United, except that while Reichwein was away on his vacation during the period from September 20th to October 18th Allen R. Le Roy, another vice-president of plaintiff and one of its loan officers, was in charge of the account. Towards the end of September William F. Collins, who was at that time the cashier of plaintiff, after making a cursory examination of the United's account told Le Roy that in his opinion there was "a fair possibility" that United was engaged in a kite. Le Roy then investigated the account and told Collins that he agreed that United might be engaged in a kite and that the matter should be discussed with Raymond L. Redheffer, who was then the president of plaintiff. Collins and Le Roy then had a discussion with Redheffer about the matter. In this discussion Collins told Redheffer that in his opinion the account indicated a possibility of check kiting and Le Roy suggested to Redheffer that a more thorough examination be made of the account. Redheffer agreed that this should be done. William Edward Tague, who was at that time an assistant credit manager and chief field auditor of plaintiff, was then directed to investigate the books of United to determine (a) why United was drawing so heavily on uncollected funds, (b) the checks on both sides of the account and (c) from what source United was getting the funds which were being deposited to its credit in its commercial account.

16. Prior to the end of September Tague had been making periodical audits of United's books.

And Tague upon being instructed to make a special investigation of these books for said purposes did investigate them and made a report, dated October 1st, which was introduced in evidence as defendant's exhibit R. This report stated that United had advanced to three growers, Mazzie Farms, Jacks Fruit Company and Lofendo, during July, August and September \$1,976,285.62 and had received from them \$1,858,010.33. This report also stated that Gassman, an employee of United, had explained the checks on both sides by stating in effect that anyone of the three growers, Lofendo, for instance, would purchase produce and would then be reimbursed by United by means of a check from United and that Lofendo would then sell such produce and would collect the proceeds of the sale and would then send his check to United for such proceeds. This explanation contained in the report and its statement that United was making these large advances to the three growers should not have allayed any doubts in the minds of plaintiff's officers with respect to the kite suggested by Collins, but should have accentuated their doubts. This is so for the following reasons:

(a) As United was in the business of buying, selling and shipping produce, it was unreasonable to believe that it would finance others to the extent to which the report stated that it was financing the three growers so that they could engage in such business. All that United would have received on such business of the three growers would have been a small commission.

(b) As plaintiff was financing United by loans

up to plaintiff's legal limit and by discounting United's drafts in substantial amounts and as plaintiff expected to receive all of United's accounts receivable as collateral, it would have been unreasonable for plaintiff to acquiesce in United's making such large advances to growers in transactions from which plaintiff received no collateral.

(c) As United's capital was limited and as the frequent noon-day over-drafts in its account indicated a lack of working capital and as all the proceeds of its sales were going to plaintiff either under the assignments of its accounts receivable or by plaintiff's discounting of its drafts, plaintiff's officers should have had grave doubts respecting the source from which United was getting the funds to make the advances which the report stated it was making to the three growers.

(d) And Le Roy testified that one of the reasons why Tague was directed to make his special investigation was that as plaintiff by virtue of the assignments executed to it by United should have been receiving all of the proceeds of United's sale and by virtue of its discounts all the proceeds of United's drafts, he was puzzled to know where United was getting the checks being credited to its commercial account, and so the report should have increased Le Roy's bewilderment because the report showed that United was advancing funds in very substantial amounts without United having any source from which to make such advances.

17. Tague was negligent in the making of his audits and his special investigation leading to his

report of October 1st. If he had exercised reasonable care in making his audits and such investigation the kite would have been disclosed.

(a) Although Tague in his report of October 1st stated that United was making advances to Mazzie Farms, Jacks Fruit Company and Lofendo and was being reimbursed by them, the books of United which Tague must have examined to get these figures showed that United was making substantially all of these advances to Lofendo and was receiving substantially all of the repayments from Mazzie. If Tague had not been negligent in making his audits and said special investigation, he would have discovered this fact immediately upon examining the books; and when he discovered it, he would have known that something was radically wrong demanding further investigation; and such further investigation would have disclosed the kite.

(b) When United on any day would endorse and deliver to plaintiff checks of debtors received by it on account of accounts receivable, it would accompany such checks with a remittance sheet specifying the names of the debtors and the amounts of their checks. A comparison of the cash receipts book of United with the remittance sheets delivered by United to plaintiff during said period from July 1st to November 19th shows that on 109 occasions during said period the following was the fact: on each of such occasions the cash receipts book of United showed that it had received payments from debtors; the cash receipts book specified the names

of such debtors and the amounts paid by each of them; whereas the remittance sheet which was delivered to plaintiff and accompanied the checks representing such payments omitted the names of certain of such debtors and substituted the name of Lofendo for the omitted names and a check of Lofendo for the checks of the omitted debtors. This discrepancy could have been observed upon the most superficial comparison of the remittance sheets with the books of United. Tague was negligent in not noticing it; and if he had noticed it and had made an investigation of it, the kite would have been disclosed immediately.

18. On October 4th, after Tague had made his dubious report, Le Roy, who was then in charge of the account during Reichwein's absence, had a conference with Rosenthal, the secretary-treasurer of United, in which Le Roy told Rosenthal that United should cause the funds represented by checks on California banks which were being credited to United's account to be deposited to the credit of plaintiff in such banks and should have the California banks give telegraphic advice to plaintiff to that effect. Almost all of these checks were Lofendo checks payable to United. United did not follow this instruction of Le Roy. On October 6th Le Roy told Rosenthal that he should arrange that United should not draw on uncollected funds after October 13th. United then asked Le Roy to permit it to continue to draw on uncollected funds until October 18th, and Le Roy, with Redheffer's con-

currence, told it that it could continue this practice until that day. On October 18th, the day on which Reichwein returned from his vacation, Le Roy turned the supervision of the account back to Reichwein. On October 18th United had not stopped drawing on uncollected funds and so Reichwein on that day and on later days requested Rosenthal to have United stop this practice. But United did not stop drawing against uncollected funds in its commercial account until the end of October. (As will be stated later, although United discontinued drawing on uncollected funds in its commercial account at the end of October, it continued in effect to draw on uncollected funds after the end of October by the use of its loan account.)

19. Reichwein testified that at no time until United's collapse on November 17th was he aware that there were checks on both sides of the United's commercial account and that after his return from his vacation on October 18th Le Roy did not tell him that plaintiff had caused Tague to make a special investigation of United's books in order to investigate the fact that it was drawing heavily against uncollected funds and the checks on both sides of its commercial account. Whether this testimony of Reichwein is true or false it shows unusual negligence on his part. If Reichwein did not know that there were checks on both sides of United's commercial account until United's collapse on November 17th, he was extremely negligent. If after Reichwein returned from his vacation Le Roy did not call to

his attention Tague's report and did not tell him that Tague had been directed to make an investigation of the checks on both sides of United's commercial account, Le Roy was extremely negligent; whereas, if Le Roy did tell Reichwein these facts, Reichwein should have been alerted to the dangers involved in the situation and should have taken reasonable measures to find out what was going on. But Reichwein did nothing whatever with respect to the account except to give United the same directions which had been given United by Le Roy while Reichwein was on his vacation, that is directions to stop drawing on uncollected funds in its commercial account. But United did not even stop doing this until the end of October; and then as will be stated later, it continued to draw on uncollected funds by the use of its loan account.

20. And so the facts are that after Collins had given Le Roy and Redheffer his warning that United might be engaged in a kite and after Tague had made his dubious report, plaintiff did absolutely nothing to investigate the transactions between Lofendo and United giving rise to the checks on both sides; but that all plaintiff did was to direct United on several occasions to stop drawing upon uncollected funds; and that United despite these directions did not stop drawing on uncollected funds in its commercial account until the end of October. And during this time plaintiff was loaning United \$200,000.00, plaintiff's legal limit; and was discounting for United drafts in a substantial amount; and

during this time plaintiff had access to United's books and records and was in constant touch with its officers and employees. These facts in themselves show that plaintiff was grossly negligent in not having discovered the kite. But there are other facts which establish even more clearly that plaintiff was grossly negligent in this respect.

21. During the month of September the accounts receivable assigned by United to plaintiff aggregated \$1,056,338.16. Included in these assignments were assignments of accounts receivable of Lofendo to United aggregating \$43,305.00. The monthly assignment of August 28th assigning to plaintiff all the accounts receivable of United outstanding on that date showed that such accounts aggregated \$469,-050.13 and included accounts receivable of \$6,666.00 owing by Lofendo. During the month of September, the total remittances received by plaintiff from United on account of accounts receivable aggregated \$777,629.89; and during this month the total Lofendo remittances received by plaintiff aggregated \$341,-250.30, or about 44% of the aggregate. And so the records of plaintiff showed that at the end of August plaintiff held accounts receivable owing by Lofendo to United aggregating \$6,666.00 and during September it received Lofendo checks on account of assigned accounts receivable aggregating \$341,250.00, or about 44% of the aggregate payments received by it from United on account of accounts receivable in that month.

22. During the month of October the accounts

receivable assigned by United to plaintiff aggregated \$1,456,506.72. Included in these assignments were assignments of accounts receivable of Lofendo to United aggregating \$105,718.22. The monthly assignment of October 2nd, assigning to plaintiff all the accounts receivable of United outstanding on that date showed that such accounts aggregated \$475,334.28 and included accounts receivable of \$12,609.00 owing by Lofendo. During the month of October, the total remittances received by plaintiff from United on account of accounts receivable aggregated \$1,168,029.96; and during this month the total Lofendo remittances received by plaintiff aggregated \$899,909.64, or 80% of the total. And so the records of plaintiff showed that at the end of September plaintiff held accounts receivable owing by Lofendo to United aggregating \$12,609.00, and that during October it received Lofendo checks on account of assigned accounts receivable aggregating \$899,909.64, or about 80% of the aggregate payments received by it from United on account of accounts receivable in that month.

23. During the first sixteen days of November the accounts receivable assigned by United to plaintiff aggregated \$1,104,133.30. Included in these assignments were assignments of accounts receivable of Lofendo to United aggregating \$434,527.69. The monthly assignment of October 30th assigning to plaintiff the accounts receivable of United outstanding on that date showed that such accounts aggregated \$470,099.35 and included accounts re-

ceivable of \$7,350.00 owing by Lofendo. During the first sixteen days of November, the total remittances received by plaintiff from United on account of accounts receivable aggregated \$1,087,046.62; and during this month the total Lofendo remittances received by plaintiff aggregated \$998,326.98, or about 90% of the aggregate. And so the records of plaintiff showed that at the end of October plaintiff held accounts receivable owing by Lofendo to United aggregating \$7,350.00 and that during the first sixteen days of November it received Lofendo checks on account of assigned accounts receivable aggregating \$1,087,046.62, or about 90% of the aggregate payments received by it from United on account of accounts receivable in that month.

24. It thus appears that during September, October and the first seventeen days of November Lofendo checks were pouring into plaintiff's loan account in numbers and amounts which were most unusual. This fact, which was disclosed by the records of plaintiff, should have come to the attention of Reichwein, who was in charge of the account, and of Le Roy who was in charge of it during Reichwein's absence; and plaintiff was most negligent in not having discovered this fact; and if it had been discovered and investigated, the kite would have been disclosed at once.

25. As already stated, the practice of plaintiff in carrying on its business with United was that when United delivered to plaintiff checks of debtors owing assigned accounts receivable, plaintiff would apply

the amount of such checks on account of United's indebtedness to it and on the same day plaintiff would make a new loan to United equal to the amount of such checks, so as to maintain United's indebtedness to it at \$200,000.00. Plaintiff did not make such new loans to United on the basis of such remittances, but such new loans were independent transactions based on new notes and secured by the assignments of additional accounts receivable.

26. The result of this practice was that when plaintiff received a remittance of Lofendo checks, which were pouring into United's loan account during the months of September and October and the first seventeen days of November, plaintiff would make a new loan to United equal to the amount of the remittance and this new loan would be credited to United's commercial account. Although such Lofendo checks did not create credits in United's commercial account, still under this practice the delivery of such checks to plaintiff and their application by plaintiff to United's indebtedness to it led to new loans and the new loans to such credits. And so United was enabled to carry on the kite, not only by depositing Lofendo's checks to its credit in its commercial account, but also by delivering Lofendo checks to plaintiff as remittances and at the same time getting new loans and new credits. And likewise United was drawing on uncollected funds, not only by depositing Lofendo checks to its credit in its commercial account and drawing on the credits so created before such checks were collected, but

also by delivering Lofendo checks to plaintiff as remittances and at the same time getting new loans and new credits. Beginning about October 29th, the amount of the float with respect to the Lofendo checks received as remittances began to increase and increased more or less steadily to November 16th; and on November 15th this float amounted to the enormous total of \$602,535.61. In other words, on that day United was in effect drawing on uncollected funds in that amount.

27. The new loans made by plaintiff to United which by reason of the practice described in paragraph 25 were related to the Lofendo checks received by plaintiff as remittances increased from \$341,250.30 in September to \$899,900.69 in October and to \$998,326.98 during the first seventeen days of November. The making by plaintiff to United of new loans aggregating those large amounts related in the way just indicated to such Lofendo checks was negligent banking.

28. Although plaintiff was making new loans to United in amounts far in excess of plaintiff's legal limit of \$200,000.00, the net amount of its loans was kept at \$200,000.00 in the following manner: All the notes executed by United to plaintiff during any month to evidence the additional loans made by plaintiff to United during that month would mature on the fifth day of the following month and on their maturity such notes would be retired and paid by the application to them of the remittances delivered by United to plaintiff during the month during which such notes were executed. During

each month the difference on any day between the aggregate of remittances received during such month and the aggregate of the notes executed during such month was maintained at \$200,000.00. In other words, the remittances received during any month were considered as cash offsetting the indebtedness under the notes executed during any such month so that the net loan was maintained at \$200,000.00.

29. The facts stated in paragraphs 21 to 23 and in paragraphs 26 and 27 were all disclosed by plaintiff's records and therefore plaintiff is charged with knowledge of them. But as plaintiff was loaning United its legal limit of \$200,000.00 and was discounting for United drafts of United in substantial amounts (the outstanding drafts discounted by plaintiff for United averaged each day of said period from \$150,000.00 to \$200,000.00), the officers of plaintiff charged with the supervision of the account should have been aware of said facts. If such officers had been aware of said facts, even a superficial investigation of them would have led immediately to the discovery and termination of the kite. If such officers were aware of said facts and did nothing to investigate them, they were grossly negligent; but if on the other hand they were not aware of said facts they, as stated, should have been aware of them and their failure to be aware of them was grossly negligent.

30. During the month of July, there was a noon-day overdraft in the commercial ledger of United with plaintiff on eight days; in August on ten days;

in September on five days; in October on ten days; and from November 1st to November 16th on five days; and on each of these days on which a noon-day red balance was posted to United's account (which posting was done on the day succeeding the day as of which the entry was made) it was necessary for United to create credits to its account so that on the day of posting the noon-day overdraft would not on that day become an actual overdraft. Whenever there was a noon-day overdraft in United's commercial account the fact that there was such an overdraft and the checks creating it would on the day of posting be called to Reichwein's attention and Reichwein would thereupon call on United to supply in its commercial account the credits necessary to prevent such noon-day overdraft from becoming on that day an actual overdraft. These credits were supplied either by the deposit of Lofendo checks or by the plaintiff making new loans to United or the plaintiff discounting drafts for United. Many of such new loans were related in the manner already described to the Lofendo checks being delivered by United to plaintiff as remittances. The repeated appearance of these noon-day overdrafts in United's commercial account showed that United lacked adequate funds to maintain a good balance to its credit in its commercial account, and so Reichwein in making new loans to United contemporaneously with the receipt by plaintiff of remittances from United should have carefully scrutinized the new collateral and the financial posi-

tion of United. But he did not do so; and when he failed to do so he compounded his negligence.

30a. Both the four and the six checks were part of the kite. The facts stated in paragraphs 13 to and including 30 show that at least during the months of September and October plaintiff negligently permitted the kite to go on. If the kite had not gone on the four and the six checks would not have been drawn and the loss which shall have to be suffered because they were drawn and paid would not have occurred and so plaintiff's negligence in permitting the kite to go on proximately caused this loss.

IV.

Defendant Was Not Guilty of Negligence in Not Discovering the Kite

31. Lofendo opened his account with the branch on March 12th. At that time he met Frank Etribou, the manager of the branch, and made a deposit in cash. But all the deposits thereafter made in his account with the branch were made by mail, and he remained a stranger to the officers of the branch. Lofendo never borrowed any money from the branch and never applied to it for a loan. During the period from October 11th to October 18th, while I. N. Tarr, the operations officer of the branch, was away on his vacation, Joseph C. Cosgrove, its assistant manager, discovered that Lofendo was depositing to his credit checks drawn by United on plaintiff to the order of Lofendo and that he was drawing checks on his account payable to

United and that the branch was paying checks drawn on the account before checks deposited had a chance to clear; and he thought these circumstances required an explanation. When Tarr returned from his vacation on October 18th, Cosgrove told him what he had discovered about the account; and Tarr suggested that he should wire plaintiff asking a report with respect to United's financial responsibility. Tarr then wired plaintiff asking for such a report and in reply received Reichwein's wire of October 20th (Defendant's Exhibit O). This wire gave Tarr certain information with respect to United and suggested that Tarr contact the main branch of defendant at Fresno for additional information. Tarr thereupon telephoned to the Fresno Branch and asked Nelson, the man with whom he talked for information on [20] the credit responsibility of United. Nelson then read to Tarr over the telephone a letter, dated September 22nd, defendant's exhibit Q, which plaintiff had written the Fresno Branch. Both the wire and the letter stated in substance that United was a good customer of plaintiff and worthy of credit. But much of the information given by the wire and obtained from the Fresno Branch pursuant to the suggestion made by the wire was false.

32. The letter says that United was maintaining "balances averaging in satisfactory five figure proportions;" but, as stated, there were in United's account frequent noon-day overdrafts which would have been actual overdrafts on the days on which

such overdrafts appeared if they had not been met by additional loans or discounts; and in addition, as also stated, United had been drawing heavily on uncollected funds and on October 20th was continuing to do so despite plaintiff's direction to it to discontinue the practice. The letter says that United was making "proper use" of the loan being made to it; but it was not; at the very time when the wire of October 20th was sent, Lofendo checks in tremendous amounts were pouring into plaintiff as remittances on account of accounts receivable which certainly did not indicate a proper use of the commitment. The letter says that "the company is making progress from the standpoint of operation." But a company with frequent noon-day overdrafts, which is drawing heavily on uncollected [20a] funds and which is making remittances on account of pledged accounts receivable of one debtor in extremely large amounts, is not making progress from the standpoint of operation. And the letter says that plaintiff has "come to entertain a favorable regard for the account"; but in view of what had occurred respecting the account from the time Collins started his investigation to the date of Reichwein's wire plaintiff could not possibly have entertained such a regard for it.

33. Reichwein either knew that the information he was giving the branch by the wire was either false, or he made the representations made by the wire without reasonable grounds for believing them to be true.

34. The branch relied on the wire and the information which as suggested by the wire it received from Fresno Branch; and the wire and this information created in it a feeling of security with respect to the Lofendo account.

35. After Tarr had received the wire, Etribou did not terminate the Lofendo account, but he gave instructions that the branch should not accept for immediate credit checks of United being drawn to the order of Lofendo, which Lofendo might thereafter deposit in the branch until Lofendo could be contacted and his methods of operation discussed. At that time Tarr placed a "hold" on the Lofendo account, that is he arranged that the branch upon receiving checks for deposit in the Lofendo account should give Lofendo credit for them, but should not pay checks against such credits until the checks credited to the account had an opportunity to clear.

36. After Etribou had given these instructions, Tarr made an effort to contact Lofendo and as a result of this [21] effort towards the latter part of October, Lofendo and Rosenthal appeared at the branch and conferred with Cosgrove. Cosgrove told Lofendo and Rosenthal that his branch wanted Lofendo to give checks deposited to his account a chance to clear before he drew checks against them; that the branch wanted Lofendo to maintain a larger balance in the account; and that it wanted an explanation of the checks payable from Lofendo to United and from United to Lofendo. Rosenthal thereupon explained these checks to Cosgrove by

telling him that when United made a purchase for Lofendo's account, Lofendo would give it a check for the amount; that United would then sell the produce and give Lofendo a check for the proceeds. Cosgrove then told Rosenthal that he wanted a letter from United giving this explanation so that the branch would have a record in its files that the transactions between Lofendo and United giving rise to the checks on both sides were bona fide purchases and sales. Rosenthal replied that he would give the branch such a letter. Cosgrove then told Etribou and Tarr what had been stated in the conversation and that he was satisfied.

37. After the lapse of about ten days following Cosgrove's discussion with Rosenthal and Lofendo, Cosgrove and Tarr discussed the account. Tarr told Cosgrove that the account had not improved and Cosgrove informed Tarr that the letter for which he had asked Rosenthal had not been received. The account was then discussed at a meeting of the officers of the branch on November 10th; and at this meeting Etribou gave instructions that when Lofendo deposited checks he should not be given credit for them, but that the checks should be sent on for collection.

38. On November 12th the branch for the first time rejected checks aggregating \$57,694.97, drawn by Lofendo on the account because of lack of sufficient funds to pay them. On that day the branch wired the San Francisco head office of [22] defendant that it had rejected these checks, and on

November 13th (a Saturday), such head office wired plaintiff that these checks had been rejected. Plaintiff received this wire on November 15th. On November 16th the branch for the same reason and for the second time rejected additional checks aggregating \$110,265.04, drawn by Lofendo on the account; and on November 17th the plaintiff received another wire from defendant notifying it of the rejection of these additional checks. When on November 17th plaintiff received this second wire notifying it of the rejection of additional checks, it called in Rosenthal and had a discussion with him which led to the admission by Rosenthal that United had been borrowing from plaintiff on fictitious collateral.

39. On November 10th, the only thing that had occurred adverse to Lofendo which had come to the notice of the branch was that Lofendo had not supplied the branch with the letter which Cosgrove had requested. But this circumstance was not of such a serious import as to lead the branch to believe that Lofendo and United were engaged in a fraudulent kiting operation, particularly in view of Reichwein's wire to Tarr of October 20th, and the information which pursuant to Reichwein's suggestion Tarr had obtained from the Fresno Branch. It was not until after the branch began to reject the Lofendo checks drawn on the account that it began to suspect that check kiting might be going on.

40. Defendant was not negligent in not having discovered the kite.

VI.

The Conversations of November 17th and 18th
between the Officers of the Parties

41. On the afternoon of November 17th, Frederick C. Messenger, an officer of plaintiff, had a telephone conversation with Etribou. In this conversation Messenger told Etribou that United had perpetrated a fraud upon plaintiff and that one of its officers had admitted that it pledged fraudulent collateral to plaintiff; and that plaintiff had sent to the branch an advice of credit for the six checks. Messenger then asked Etribou if the branch had received this advice of credit. Etribou replied that the branch had not received the advice. Etribou also told Messenger that the branch had not been paying against uncollected funds and was in the clear and had a balance of \$699.02. Messenger then asked Etribou if the branch upon receiving the advice of credit would not enter the credit. Etribou replied that he would be happy to do anything he could to assist plaintiff, but that he would have to enter the credit when it was received and that if plaintiff would send out checks of Lofendo drawn on the account he would do what he could to give plaintiff preference in charging such checks against the credit. In this conversation no agreement was made between plaintiff and defendant under which defendant agreed that it would surrender its rights arising out of payment of the six checks by plaintiff.

42. LeRoy left Chicago by air during the night

of November 17th and arrived in San Francisco on the morning of November 18th and went to the head office of defendant in San Francisco where he had conversation with Roland T. Duncan, an officer of defendant, and Kenneth M. Johnson, a lawyer employed in the legal department of the defendant. This paragraph states what was said in the conversation. LeRoy told Duncan and Johnson that Merchandise was to take a large loss in its business transactions with United and that one of plaintiff's clerks had mailed the advice of credit for the six checks by mistake when it should not have been mailed; and that the advice of credit had been sent out in error because the six checks had been charged against fictitious credits and that for these reasons plaintiff had revoked the advice of credit. Duncan told LeRoy that he had learned upon communicating with Etribou that the branch had not been paying checks against uncollected funds and that Lofendo's account had a credit of \$699.02. (All those who took part in the conversations of November 17th and 18th believed that the branch had not been paying against uncollected funds and that Lofendo had a balance of good funds to his credit of \$699.02; and they conversed with one another on this basis; but the fact was that they were all mistaken because, as will be stated more in detail later, at the time of these conversations the branch had paid checks drawn by Lofendo against uncollected funds and Lofendo, instead of having a balance of good funds to his credit, was indebted to the branch.) Johnson told

LeRoy that he and Duncan wanted to assist plaintiff in any way they could, but that Johnson would not try to determine at that time the ultimate legal rights and duties of plaintiff and Lofendo arising out of the payment of the six checks. During the conversation between Duncan, Johnson and LeRoy, Johnson had a telephone conversation with Etribou in which Etribou repeated to Johnson that the branch had not been paying against uncollected funds and that there was a balance to Lofendo's credit of \$699.02; and in which Johnson told Etribou that on the basis of this information given him by LeRoy and Etribou the branch should ignore the advice of credit when the advice was received and that it should freeze the account and should not permit any transactions of any kind relating to it on the part of anybody. In the conversations between LeRoy on one hand and Johnson and Duncan on the other no agreement was made between plaintiff and defendant under which defendant agreed that it would surrender its rights arising out of the payment of the six checks by plaintiff.

43. But if the conversation between Messenger and Etribou or the conversations between Duncan, Johnson and LeRoy had created an agreement between plaintiff and defendant that defendant would surrender its rights arising out of the payment by plaintiff of the six checks, such agreements would have been invalid (a) because it lacked consideration; (b) because it was based upon the mutual

mistake of the parties that the branch had not been paying against uncollected funds and that there was in Lofendo's account a credit balance of good funds of \$699.02; and (c) because it was induced by the false representations of both Messenger and LeRoy that the advice of credit respecting the six checks had been mailed by one of plaintiff's clerks when it should not have been mailed and that the six checks had been charged against fictitious credits.

VII.

Plaintiff Was Not Induced by Mistake or Fraud to Pay the Six or Four Checks; Plaintiff's Mistake Was in Negligently Making Loans to United Secured by Fraudulent Collateral

44. The commercial ledger sheet of the United account with plaintiff marked defendant's Exhibit HH, shows that at the close of business on November 10th, there was a balance to the credit of United of \$7,673.09. November 11th was a holiday. On November 12th, the four checks, together with other checks, were debited to the account. On that day amounts aggregating \$167,710.43, were credited to the account. And at the close of business on November 12th, the balance to United's credit in its commercial account was \$77,617.55.

45. This commercial ledger sheet of United's account with plaintiff also shows that at the close of business on November 13th, which was a Saturday, there was a balance to the credit of United of \$241,525.04. On November 15th, which

was Monday, the six checks, together with other checks, were debited to the account. On that date amounts aggregating \$76,093.55 were credited to the account. And at the close of business on November 15th, the balance to the United's credit in its commercial account was \$176,650.65.

46. The balances referred to in paragraphs 44 and 45 to the credit of United in its commercial account were created mainly by the crediting to the account of the proceeds of new loans made by plaintiff to United in accordance with the practice already described, but a small part of these balances was created by the crediting thereto of the proceeds of drafts discounted by plaintiff for United.

47. After November 15th, Lofendo checks aggregating \$534,548.18, which United had delivered to plaintiff as remittances on account of assigned accounts receivable and which plaintiff upon their receipt had applied on accounts of United's indebtedness to it, were returned to plaintiff without having been paid, and plaintiff thereupon during the period from November 17th to November 28th, exercised its right of set off by charging such Lofendo checks against the amount to the credit of United in its commercial account.

48. But when plaintiff paid both the four checks and the six checks there was a credit balance to the account of United in its commercial account and therefore plaintiff did not charge the four checks and the six checks against fictitious credits and did

not make any mistake in the payment of these checks. The mistake which plaintiff made was in making loans to United secured by fictitious collateral. And the record shows that plaintiff's mistake in this respect as well as its failure to discover the kite was due to its gross negligence.

49. The delivering by United to plaintiff of the Lofendo checks referred to in paragraph 47 did not induce plaintiff to pay checks drawn by United on its commercial account. As stated, these Lofendo checks were delivered by United to plaintiff as remittances on account of accounts receivable and were applied by plaintiff on account of United's indebtedness to it. Pursuant to the practice followed by plaintiff in its transactions with United, plaintiff, contemporaneously with the receipt of these Lofendo checks, made new loans to United and took from United notes to evidence such new loans and the assignment of additional accounts receivable to secure the same. But the making of the new loans by plaintiff to United was not based upon the receipt of the remittances, but upon the new notes and the additional collateral. In this connection Messenger testified that the remittances were not the basis of the new loans; but that "they created by their acceptance and use as a payment an area in which additional loans could be granted," and that the new loans were granted on the basis of new collateral. When the Lofendo checks which were delivered to plaintiff as remittances were refused payment the result was that United's in-

debtiness to plaintiff was increased by the amount of the checks. But the acceptance by plaintiff of the Lofendo checks as remittances did not induce plaintiff to pay checks of United drawn on its commercial account. Plaintiff paid such checks because there was a balance in United's commercial account to its credit. As already stated, this balance was created to a large extent by loans made by United to plaintiff. Plaintiff claims that it was induced to make such loans by the pledging with it of fictitious collateral. The record is not particularly clear with respect to United's fraud in pledging fictitious collateral to plaintiff. But when United by fraud induced plaintiff to make it loans secured by fictitious collateral, it was not inducing plaintiff to pay checks drawn on its account. Plaintiff was not induced by such fraud to pay checks of United, but to loan it money.

VIII.

If It Be Assumed Contrary to the Fact That Plaintiff Was Induced by Fraud or Mistake to Pay the Six and Four Checks, the Facts Show That It Cannot Recover Such Payments

50. At the close of business at the branch on November 10th, 1948, there was a balance to the credit of Lofendo of \$13,061.17 all in collected funds. On November 15th checks of Lofendo drawn on his account totalling \$75,586.86 were received at the branch in the in-clearings. \$51,862.36 of these checks were payable to United. The checks payable to United were Lofendo checks received as remit-

tances by plaintiff and applied by it on account of United's indebtedness to it. And so when the branch paid these checks for \$51,862.36 plaintiff got the benefit of the payment.

51. As at the time the checks for \$75,586.86 were received at the branch there was only a balance of \$13,061.17 to Lofendo's credit, there were insufficient funds in the account to pay them. When the \$75,586.86 were received on November 15th, the branch under section 16c of the California Bank Act had until the end of the next succeeding business day to reject them. But it did not reject them and so under the law it in effect paid them although it had not charged them against any credit in the account.

52. On September 15th the checks for \$97,207.00 were received at the branch in the mail and, pursuant to the practice of delayed posting, the branch on November 16th gave Lofendo immediate credit for this \$97,207.00 as of November 15th. Etribou testified that the giving of this credit to Lofendo was contrary to his instructions and a mistake. But defendant was bound by the act of its clerk in allowing Lofendo this credit. Under section 16c this credit was conditional until the checks were paid. And under section 16c defendant at any time after it allowed this conditional credit had the right to charge back the checks or collect them from Lofendo. In other words, Lofendo upon [29] defendant's allowing him credit for the \$97,207.00 became indebted to defendant in that amount which indebt-

edness would have terminated in the event the checks had been paid.

53. On November 16th there arrived in the branch in the in-clearings three checks for \$109,-569.15. These checks aggregating \$109,569.15 were likewise payable to United and were Lofendo checks received as remittances by plaintiff and applied by it on account of United's indebtedness to it. And so when the branch paid these checks plaintiff got the benefit of the payment.

54. As stated, the branch had until the close of business on November 16th within which to reject the checks for \$75,586.86; and as also stated, it did not reject them. And the branch had until the close of business on November 17th within which to reject the checks for \$109,564.15. And so on November 16th the branch had in its hands checks of Lofendo drawn on the account aggregating \$185,156.01 (the checks for \$75,586.86 plus the checks for \$109,-564.15); and at that time there was to the credit of Lofendo the \$13,061.17 of collected funds, plus the conditional credit of \$97,207.00.

55. The branch did not reject either the checks for \$75,586.86, nor the checks for \$109,569.15; but on November 16th it debited the checks for \$109,-569.15 against the amount of the credits then in the account, that is the \$110,268.17 (the \$13,061.17, plus the \$97,207.00). Pursuant to the practice of delayed posting of counterwork the credit of \$97,-207.00 was posted on November 16th as of November 15th; and pursuant to the practice of pre-posting

in-clearings the debit of the checks for \$109,569.15 was made on November 16th, the date of the receipt of these checks, as of November 15th. The result was that the ledger sheet of Lofendo's account shows that as of the close of business on November 15th the balance to the credit of Lofendo [30] was \$699.02. (The checks for \$109,589.15 were deducted from the credits aggregating \$110,268.17, leaving a balance of \$699.02. And so at the close of business on November 16th Lofendo had a credit balance of \$699.02 and he was indebted to the branch in the sum of \$172,094.84. The \$75,586.86, plus the \$97,-207.00, an aggregate of \$172,793.86, less the credit balance of \$699.02.)

56. It is true that in the normal operations of the branch the checks for \$75,586.86 which had been received in the in-clearings on November 15th would have been charged against the credit balance in the account prior to the charging of the checks for \$109,569.15 which were received in the in-clearings on the following day, November 16th. But it cannot make any difference which checks the branch charged against the account as of November 15th. This was a mere matter of bookkeeping. What controlled the rights of the branch with respect to Lofendo was not what it put in its books, but the facts. As stated, on November 16th, the branch had the checks for \$75,586.86 and the checks for \$100,569.15 in its hands. At that time it had the right under the law to reject all these checks, but it paid them all. It paid the \$109,569.15 by debiting these checks against the account and it in effect

paid the \$75,586.86 by not rejecting them. And as just pointed out, the result of these acts was that as of the close of business on November 16th, Lofendo was indebted to the branch for \$172,094.84.

57. On November 16th there arrived at the branch the advices of credit stating that the four checks for \$89,813.10 had been paid. This amount was credited to the account on November 17th. Pursuant to the practice of delayed posting this credit was actually posted on November 18th as of November 17th. When this credit was entered there was created on the books of the branch a credit balance in Lofendo's favor of \$90,512.12 (the \$89,813.10 plus the credit balance at the close [31] of business on November 15th of \$699.02). Concurrently with the entering on the books of the credit of \$89,813.10 the checks for \$75,586.86 were charged against the account. The result, as shown by the ledger card of the account, was that the credit balance in the account as of the close of business on November 17th was \$14,925.26. Although the account showed this credit balance as of the close of business on November 17th, the checks for \$97,207.00 had not been paid as of that day, and so Lofendo was in fact indebted to the branch in the difference between \$97,207.00 and the credit balance of \$14,925.26, or in the sum of \$82,281.74.

58. Defendant sent the checks for \$97,207.00 to Continental Illinois Bank and Trust Company of Chicago so that it could present them to plaintiff for payment. In the evening of November 18th,

the branch received a wire from the Continental Illinois Bank and Trust Company that plaintiff had rejected the checks for \$97,207.00; and so on that day it was established that defendant's right to collect this amount from Lofendo would not be terminated by the payment of the checks; and so on that day Lofendo's indebtedness to defendant for the \$82,281.74 mentioned in the next preceding paragraph became unconditional, that is it ceased to be subject to the condition that this indebtedness would be eliminated by the payment of the checks for \$97,209.00.

59. In November 19th, the advice of credit for the six checks for \$113,216.50 was received at the branch; and on that day the account was credited with this amount; and on the same day the account was debited with the \$97,207.00. Pursuant to the practice of delayed posting, these last entries were made on November 20th as of November 19th, and so the ledger card shows that at the close of business on November 19th, there was a balance to Lofendo's credit of \$30,934.76 (the credit balance as [32] of the close of business on November 17th of \$14,-925.26, plus the \$113,216.50, less the \$97,207.00).

60. As already stated, Lofendo at the close of business on November 16th was indebted to defendant in the sum of \$172,094.84 and on November 17th this indebtedness was reduced to \$82,281.74. Defendant had a lien on the six checks and on the four checks and on their proceeds to secure this indebtedness of Lofendo to it, which lien con-

tinued in existence until on November 19th, the branch entered the credit for the six checks and charged the \$97,207.00 against it. When Lofendo became indebted to defendant at the close of business on November 16th, defendant's rights to its said lien then accrued; and on that date defendant had no notice whatever that plaintiff was claiming that it was induced to pay the six checks or the four checks by fraud or mistake. Defendant, therefore, by virtue of this lien became a holder for value of the six checks and the four checks.

61. Both the six checks and the four checks were paid as part of a course of business between plaintiff and defendant involving the United's account with plaintiff and the Lofendo account with defendant and so the right of plaintiff to recover the amount paid by it on account of the six checks and the four checks depends upon what occurred in this course of business.

62. The checks for \$109,564.15 were charged against a credit balance in the account which included the conditional credit of \$97,207.00, and the checks for \$75,586.86 were charged against a credit balance in the account which included the four checks for \$89,813.10. Plaintiff got the benefit of the payment by defendant of the checks for \$109,569.15 because these checks were remittances delivered by United to plaintiff and were applied on account of United's indebtedness to plaintiff. And plaintiff got the benefit of the payment by defendant of the [33] checks for \$75,536.86, because included

among these checks were checks for \$51,862.35 delivered by United to plaintiff as remittances and applied on account of United's indebtedness to plaintiff.

63. After plaintiff got the benefit of this payment by defendant of the checks for \$109,569.15, it refused to pay the checks for \$97,207.00, the crediting of which to Lofendo's account created for the most part the credit balance against which the checks for \$109,569.15 were charged. Upon plaintiff's rejection of the checks for \$97,207.00, these checks were charged against the balance in the account created by the crediting thereto of the six checks for \$113,206.50. If plaintiff is permitted to have the \$109,569.15 charged against the \$97,207.00 and at the same time to recover the \$113,216.50 against which the \$97,207.00 was charged it will be getting the benefit of the \$97,207.00 disbursed by defendant and at the same time will be denying defendant the benefit of its payment of the six checks.

64. The checks for \$75,586.86 were charged against a credit balance made up principally of the credit created by plaintiff's payment of the four checks for \$89,813.10. As stated, plaintiff got the benefit of the payment of \$51,862.36 of these checks for \$75,586.86. If plaintiff is permitted to do what it is now seeking to do, that is to recover this payment of \$89,813.10, it will in effect be paid twice; it will have received the benefit of the payment of the checks for \$51,862.36 charged against the credit

balance made up principally of \$89,813.10 and at the same time it will have recovered this latter amount. [34]

Conclusions of Law

And now the court separately states its conclusions of law based upon the foregoing facts and directs the entry of the appropriate judgment as follows:

1. Plaintiff paid both the four checks and the six checks.
2. When the branch received the four checks and the six checks through the mail for deposit and elected to send them to defendant for collection instead of crediting the amount thereof to Lofendo's account, defendant became an agent of Lofendo for the presentation and collection of both sets of checks. When plaintiff paid the four checks and credited the defendant with the amount thereof, the agency of defendant to present and collect the four checks was thereupon terminated and plaintiff thereupon became indebted to defendant for the amount of the four checks and defendant thereupon became indebted to Lofendo for the amount thereof; and when plaintiff paid the six checks and credited defendant with the amount thereof, the agency of defendant to present and collect the six checks was thereupon terminated and plaintiff thereupon became indebted to defendant for the amount of the six checks and defendants thereupon became indebted to Lofendo for the amount thereof.

3. As plaintiff was not induced by either fraud or mistake to pay either the four or the six checks it has no grounds upon which it can recover such payments from defendant.

4. If contrary to the fact it be assumed that plaintiff was induced by fraud or mistake to pay the four and the six checks and that defendant held the proceeds of such collection as the agent of Lofendo, nevertheless plaintiff cannot recover such payments from defendant for these reasons:

(a) Defendant had a lien on the four and the six checks and their proceeds to secure Lofendo's indebtedness to it; and therefore defendant was a holder for value of the four and six checks and their proceeds and had the right to retain such payments; and

(b) As part of the course of business between plaintiff and defendant, plaintiff received a substantial benefit from the payment of the four and six checks and therefore is precluded in equity from recovering such payments.

5. If contrary to the fact it be assumed again that plaintiff was induced by fraud or mistake to pay the two groups of checks, it cannot recover such payment for this reason: As stated, upon plaintiff's paying each of the two groups of checks, it became indebted to defendant and defendant became indebted to Lofendo in the amount of such payment; and as also stated before defendant had any notice that plaintiff was induced by fraud or mistake to make such payments, Lofendo became

indebted to defendant and defendant became entitled to offset its indebtedness to Lofendo against Lofendo's indebtedness to it; and therefore defendant was in the position of a holder for value of the payments and plaintiff cannot recover them from defendant.

6. As plaintiff's negligence in failing to discover the kite proximately caused the loss which either plaintiff or defendant must suffer by reason of the payment of the four and six checks, plaintiff cannot in any event recover such payments from defendant.

And so the court hereby directs that judgment be entered in this action that plaintiff recover nothing from defendant and that defendant have judgment against plaintiff [36] for its costs of suit herein incurred.

Dated:

.....,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 24, 1950. [37]

[Title of District Court and Cause.]

STIPULATION THAT EXECUTION OF
JUDGMENT SHALL BE STAYED

Whereas, judgment has been entered in said action in favor of plaintiff and against defendant; and

Whereas, defendant has appealed or is about to appeal from said judgment; and

Whereas, Rule 73(c) of the Federal Rules of Civil Procedure provides that when a party takes an appeal he shall file a bond for costs on appeal with his notice of appeal, and Rules 62(d) and 73(d) of said Rules provide that an appellant may stay the execution of a judgment pending an appeal by giving a supersedeas bond;

Now, Therefore, plaintiff hereby stipulates and agrees (1) that plaintiff hereby waives said bond for costs on said appeal and that defendant shall not be required to file such a bond; and (2) that pending said appeal execution on said judgment shall be stayed and no proceedings shall be taken for its enforcement in the same manner and with the same effect as though defendant had given a supersedeas bond as required by said Rules 62(d) and 73(d); provided that at any time plaintiff may give defendant ten days' notice in writing that this stipulation is terminated and the said stay shall thereupon cease unless within said ten days de-

fendant shall file a supersedeas bond as required by said rules.

/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON,

/s/ THOMAS P. RIORDAN,

RIORDAN, LINKLATER &
BUTLER,

Attorneys for Plaintiff.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &
TULLEY,

Attorneys for Defendant.

So Ordered:

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Eugene J. O'Riley as trustee in bankruptcy of the estate of United Produce Company, a corporation, bankrupt, inter-

pleaded defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment of the above-entitled District Court, entered herein on the 8th day of June, 1951, dismissing the interpleader counterclaim of the above-named defendant Bank of America National Trust and Savings Association and the claim in response thereto of the said interpleaded defendant, Eugene J. O'Riley, together with the answer of said interpleaded defendant to the complaint and its reply to said interpleader counterclaim.

Dated July 6, 1951.

/s/ JOHN L. BRADLEY,
CRIMMINS, KENT, DRAPER
& BRADLEY,
Attorneys for Interpled
Defendant.

[Endorsed]: Filed July 7, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Bank of America National Trust and Savings Association, the defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from all of the final judgment of the above-entitled District Court entered in said Dis-

trict Court on the 8th day of June, 1951, in favor of Merchandise National Bank of Chicago, the plaintiff in said action, and against said defendant.

Dated June 22nd, 1951.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &
TULLEY,

By /s/ MORSE ERSKINE,

Attorneys for Defendant.

[Endorsed]: Filed June 22, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD
ON APPEAL

Bank of America National Trust and Savings Association, the defendant in the above-entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit from all of the final judgment of the above-entitled District Court entered in said District Court on the 8th day of June, 1951, in favor of Merchandise National Bank, the plaintiff in the above-entitled action, and against said defendant. Pursuant to Rule 75 of the Federal Rules of Civil Procedure, said defendant hereby designates for inclusion in the record on said appeal the complete record and all the proceedings and evidence in said action and hereby requests the

Clerk of said District Court to transmit to said Court of Appeals said complete record and said proceedings and evidence. The reporter's transcript of the evidence in said action is already on file in said District Court.

Dated June 22nd, 1951.

/s/ S. B. STEWARD, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &
TULLEY,

By /s/ MORSE ERSKINE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 22, 1950.

[Title of District Court and Cause.]

STIPULATION ON APPEAL

Whereas, Eugene J. O'Riley, interpleaded defendant above named, has filed his Notice of Appeal from a part of the judgment entered herein on June 8, 1951,

Now, Therefore, it is hereby stipulated by and among the parties hereto as follows:

(a) As to Bond. That said interpleaded defendant may be exempted from filing any bond for costs and/or supersedeas bond on such appeal.

(b) As to Record. That said interpleaded defendant shall and does hereby agree to a single record on appeal, the contents of which shall be whatever matter is designated or agreed upon by and between plaintiff and defendant Bank of America National Trust and Savings Association.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,
Attorneys for Plaintiff.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE

ERSKINE, ERSKINE &
TULLEY,

By /s/ MORSE ERSKINE,
Attorneys for Defendant Bank of America National
Trust and Savings Association.

/s/ JOHN L. BRADLEY,
CRIMMINS, KENT, DRAPER
& BRADLEY,

Attorneys for Interpledaded Defendant Eugene J.
O'Riley.

Approved:

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed July 9, 1951.

In the Southern Division of the United States
District Court for the Northern District of
California

Before: Hon. William D. Murray, Judge.

MERCHANDISE NATIONAL BANK OF CHI-
CAGO, etc.,

Plaintiff,

vs.

BANK OF AMERICA NATIONAL SAVINGS
AND LOAN ASSOCIATION,

Defendant.

No. 28721-R

REPORTER'S TRANSCRIPT

Thursday, June 15, 1950

Appearances:

For the Plaintiff:

BROBECK, PHLEGER &
HARRISON, by
MOSES LASKY, ESQ.

RIORDAN, LINKLATER &
BUTLER, by
THOMAS P. RIORDAN, ESQ.

For the Defendant:

ERSKINE, PILLSBURY & TULLEY, by
MORSE ERSKINE, ESQ.

For Interpleaded Defendant: Trustee in Bank-
ruptcy of the United Produce Corporation:

JOHN L. BRADLEY, ESQ.

The Clerk: Merchandise National Bank v. Bank of America on trial.

Mr. Lasky: Ready.

Mr. Erskine: Ready. [2*]

* * *

Mr. Lasky: I might state, in view of what counsel has [58] said as to the United Produce situation, I think that we ought to be able to stipulate that the so-called Losendo account in the East Bakersfield branch of the Bank of America was an account in which Losendo actually had no interest; it was just another account maintained by United for its own purposes.

The Court: As a result of this kiting operation?

Mr. Lasky: If we could so stipulate, it would eliminate from my proof two long depositions to establish that fact.

Mr. Erskine: I think we can do that. I would suggest to Mr. Lasky that he prepare a written stipulation and let me look at it. I always like to have a stipulation in writing so that I can read and understand what it is when I agree to it.

Mr. Lasky: I will do that over the week end, because we won't have reached that point in our proof, anyway, before then. [59]

* * *

Mr. Erskine: I suggest that that matter lie in abeyance and the Court may possibly rule upon it later.

One further thing and that is this: when the

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

pre-trial conference took place before Judge Goodman, I told Judge Goodman I proposed to file an amended answer and that I would serve a copy of my proposed amendment upon counsel on the other as quickly as I could, which I did, and I would like to file that amended answer at this time. Is there any objection to that?

Mr. Lasky: Yes, I object to the filing of an amended answer. [72]

* * *

The Court: Leave to file the amended answer is granted.

Mr. Lasky: The amended answer is also an amended counter claim, and that puts the burden on me to draw a reply to take the place of the reply of the original counter claims.

Mr. Erskine: I told you when I sent it to you that I would be willing to stipulate, if you wanted me to, that your reply to my original counter claims could be considered a reply to the counter claim stated in the amended answer.

Mr. Lasky: There is some new material in your counter claim. For example, the counter claim for the first time [73] mentions the point counsel mentioned a while ago, that we represented to them the account was good. It could be deemed we deny any such representation or reliance thereon——

Mr. Erskine: I will stipulate that is so.

Mr. Lasky: Then we do not have to file any new pleadings in response.

The Court: Very well. The pleading may stand as a reply to the amendment. [74]

* * *

With that I will terminate these preliminary remarks but merely observe, as counsel has said, Merchandise National Bank was putting its head in the sand, and I would suggest a much more appropriate statement would be the Bank of America put its hand in the pocket of Merchandise. With that I would like to call as my first witness Mr. Tobey.

LLOYD J. TOBEY

called as a witness on behalf of the plaintiff, under Rule 43 (b), Rules of Civil Procedure, sworn.

The Clerk: State your name to the Court, please?

A. Llody J. Tobey.

Mr. Lasky: I called Mr. Tobey under Rule 43(b) as an adverse witness.

Direct Examination

By Mr. Lasky:

Q. Mr. Tobey, you are a vice-president of the Bank of America, are you not?

A. An assistant vice-president.

Q. And you have been such for some eight years or nine years? A. That is correct.

Q. And you are in the cashier's department?

A. That is correct.

Q. And have been since March of 1949?

A. That is correct.

(Testimony of Lloyd J. Tobey.)

Q. Prior to that you were in the defendant Bank of America's [78] controller's department, is that right? A. That is correct.

Q. You were in the controller's department in the month of November, 1948?

A. That is correct.

Q. And your duties as such were to handle operating errors, differences arising from check operations, where branches had made errors that might result in losses? Those things came to your attention for review, is that right?

A. That is correct.

Q. You made investigations of such transactions?

A. Yes, sir.

Q. Might it fairly be said that you were in the nature of a trouble shooter for the Bank of America at that time? A. That is correct.

Q. It is a fact is it not that in the year 1948 Merchandise National Bank, the plaintiff in this case, had considerable sums of money on deposit with your bank at the head office? A. Yes, sir.

Mr. Lasky: Will you produce for me, counsel, the original ledger sheets which are the Duncan Exhibit 1 on the exhibits?

Mr. Erskine: Will you leave the stand, Mr. Tobey, and get it? He knows where it is.

The Court: Can't you stipulate on that?

Mr. Lasky: Yes, I think we will stipulate that is it, [79] but we want to offer it in evidence. I suggest you get out all those exhibits and lay them on the table so we can get them in a hurry. I

(Testimony of Lloyd J. Tobey.)

believe the Court will find we will have no difficulties in the authentication of copies?

The Witness: You wish just the exhibits of the Bank of America?

Mr. Lasky: That is right, the ones that were taken on the San Francisco depositions.

The Court: The amount on deposit.

Mr. Lasky: Yes.

The Court: Can't you stipulate what the amount is and keep the records out of evidence?

Mr. Lasky: The amount kept varying from day to day here.

The Court: On what day is it important here? Stipulate as to the dates and then we won't have to be bothered with the records. Whatever dates are important to you, the records show, and you can stipulate on that, don't you think? There is no use cluttering the record.

Mr. Lasky: There is a certain entry I want to point to and I think this might be helpful to have it. We do not need this. Will it be stipulated what I have here is a true transcript of the ledger of the Merchandise National Bank's account as you kept it on the books of the Bank of America?

Mr. Erskine: That is true?

The Witness: Yes. [80]

Mr. Erskine: I will stipulate.

The Court: You wish it to be received in evidence?

Mr. Lasky: Yes, your Honor.

(Testimony of Lloyd J. Tobey.)

The Court: Have it marked, and it is admitted upon stipulation.

(Whereupon the ledger sheets referred to were received in evidence and marked plaintiff's Exhibit 1.)

Q. (By Mr. Lasky): Perhaps you can find it more quickly than I can, Mr. Tobey, the \$113,000 charge. I thought it was on page 6. Have you got it there?

A. That is a photostat of it. I have got to get the date of it. Right here (indicating).

Q. On one of the pages, under the date November 19th, appears a debit of \$113,216.50.

If your Honor please, that is the charge which is the controversy in this case, over the right of the Bank of America to make that.

Q. Now, Mr. Tobey, it is a fact, is it not, that you personally were the man who caused that charge to be made? A. That is correct.

Q. You did so on the evening of November 19th?

A. That is correct.

Q. Along about 5 o'clock in the afternoon?

A. That is correct.

Q. And at that time you personally prepared a certain debit [81] slip, did you not?

A. That is correct.

Q. Have you the original? I have merely the photostat, and the photostat does not show plainly something I want to bring out.

Mr. Erskine: We are perfectly willing to have you use photostat when it is convenient for you.

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: Oh, yes. In most cases we will do so. The photostat does not happen to be clear in this case.

Q. On that day late in the afternoon of November 19, upon your own responsibility, Mr. Tobey, you prepared this debit slip, did you not?

The Court: You had better have it marked first for identification.

Mr. Lasky: Very well. Will you mark this Plaintiff's Exhibit for identification?

(The document referred to was thereupon marked Plaintiff's Exhibit 2 for identification.)

Q. (By Mr. Lasky): Then I will repeat that question: It is a fact that on November 19th, late in the afternoon, on your own responsibility you prepared this debit slip, caused it to be prepared, and that is your signature upon it?

A. That is correct.

Q. This is the basis upon which the \$113,000 entry in the ledger account was entered? [82]

A. That is correct.

Q. And this reads, "General ledger debit, Accounting Department, San Francisco Headquarters, November 19, 1948, \$113,216.50. Contra: Suspense liabilities administration. Total collection letter of East Bakersfield branch No. 419 to Merchandise National Bank of Chicago for which they have credit advice and are sending their credit. This debit requested by Mr. Etribou from telephone call to Mr. George Schilling, Legal Department."

(Testimony of Lloyd J. Tobey.)

Now, I call your attention to the fact that something has been x'ed out on the typewriter. Is it not a fact that what has been x'ed out after the word "To Mr. George Schilling" are the words "to protect his debit"? A. That is correct.

Q. You caused this charge to be made in the Merchandise National Bank account to protect Etribou's credit to the account of Losendo?

A. No, sir, to protect his debit against the account of the Merchandise National Bank, which he had made that day, and was sending up through the usual channels.

Q. You did not receive any such debit from Mr. Etribou for several days, however, did you?

A. That is correct, I did not receive it. It came in the regular course of business by mail.

Q. Several days later?

A. On Monday the 22nd, to be exact. [83]

Q. But before that had happened you had already caused this charge to be made upon the books?

A. As indicated, at his request.

Q. And how was the request made?

A. Through Mr. Schilling.

Q. Through Mr. Schilling?

A. That is right.

Q. That is what Mr. Schilling told you?

A. That is correct.

Q. You did not get it from Mr. Etribou himself?

A. You read on the debit just how I made it and

(Testimony of Lloyd J. Tobey.)

how it was made, so I can't change what I said there and what is the fact.

Q. Late in the afternoon of the 19th, Mr. George Schilling of the Legal Department told you that he had had a telephone conversation with Etribou, and following that conversation you made this charge, is that right?

A. That is not correct, either. [84]

Q. What is the fact?

A. There was a telephone call in the afternoon and—when we were in Mr. Schilling's office, and during that conversation Mr. Etribou told him that he was making the debit and asked us to make the debit against the account of the Merchandise Bank.

Q. Are you relating now what was said to you by Mr. Schilling? A. I am.

Q. You didn't hear this telephone conversation yourself? A. No, sir.

Mr. Lasky: Then I move that the recital of the phone conversation go out as hearsay.

The Court: It may be stricken.

Q. (By Mr. Lasky): At the time Mr. Etribou was manager of the East Bakersfield branch, is that correct? A. That is correct.

Q. You are acquainted with the banking practices of the Bank of America, are you not, particularly with the practice concerning charges or debits to the accounts of correspondent banks and the practice particularly with reference to the account of Merchandise National Bank with respect to making debit entries against it had always been up to

(Testimony of Lloyd J. Tobey.)

that date that such debits as would be made would be predicated only on some kind of written paper from Merchandise Bank constituting an authorization to make the entry, is that correct? [85]

A. I don't think that that is correct in every respect.

Q. Well, in what respect—

A. I think that question of yours is a little broad, because there are different entries made, all different debit entries made.

Q. All right; I will confine it. With respect to charges against the account of Merchandise Bank resulting from alleged collections sent on to Merchandise Bank it had always been the uniform practice, had it not, that no charge would be made against the account of the Merchandise Bank unless, No. 1, a written paper of some kind constituting an authorization to make the entry, had been received from Merchandise Bank; that is true, No. 1, is it not?

A. That is true.

Q. And No. 2, it had always been the practice that the authority to the head office to make the charge against the account first came from the branch where the collection had originated?

A. That is correct.

Q. So in the case of any collection by the Merchandise Bank prior to this particular debit, the entry of debits of collections were made in the head office accounting department only on the basis of a written debit slip coming up from the branch where the collection originated?

(Testimony of Lloyd J. Tobey.)

A. That is correct.

Q. That practice was not followed here, is that right? [86]

A. That is true to the—except to the extent that I am explaining that it was being made on the request of the branch officer.

Q. The fact is that in this case this was an unusual entry with respect to the account of Merchandise National Bank? A. That is true.

Mr. Lasky: That is all. No further questions of Mr. Tobey.

Cross-Examination

By Mr. Erskine:

Q. Just a second, Mr. Tobey. Will you take the stand?

You stated in answer to a question put to you by counsel that a charge was not made against the Merchandise account unless the Bank of America had same paper from the Merchandise Bank supporting the charge. You said "Yes" to that question, did you not?

A. It was confined to a collection.

Q. Yes?

A. It was in that case, but there was an advice of payment.

Q. Would you get me the advice of credit relating to the six checks, the original advice of credit, from among the exhibits?

Mr. Erskine: Will you mark this?

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: Pardon me. Apparently I forgot to offer plaintiff's exhibit 2 for identification in evidence. I make that offer.

The Court: Is there any objection? [87]

Mr. Erskine: No.

The Court: It is so admitted.

The Clerk: Plaintiff's Exhibit 2 in evidence.

This is defendant's A for identification (referring to paper offered by Mr. Erskine.)

Mr. Erskine: Mr. Lasky, will it be stipulated that defendant's exhibit A for identification is the advice of credit sent out by the Merchandise Bank relating to the six checks on November 15?

Mr. Lasky: Oh, yes; I have no question about that.

Q. (By Mr. Erskine): Calling your attention to defendant's exhibit A for identification, Mr. Tobey, I will ask you whether or not when the Bank of America made that charge against the Merchandise account on November 19, the Bank of America had in its hands the advice of credit, defendant's exhibit A for identification, which I am now showing you.

Mr. Lasky: I object to that on the ground that it calls for a statement by this witness that he is not yet shown to know anything about, or that he knew anything about that at the time he caused the entry to be made in the account.

Mr. Erskine: Well, I will just—

The Court: This is just in the nature of a preliminary question, is it?

(Testimony of Lloyd J. Tobey.)

Mr. Erskine: I will show what he knew about it, your Honor.

The Court: What he knew about it, yes. [88]

Mr. Erskine: At the time he directed the entry to be made.

The Court: Then it will go to its weight, what he knew about the matter. Your objection is now overruled.

A. Are you asking me a question?

Mr. Erskine: Would you read the question, to save repetition, Mr. Reporter?

(Question read by the reporter.)

A. This advice of credit was in the hands of the East Bakersfield branch on the morning of November 19th, and Mr. Etribou, according to my understanding, told Mr. Schilling that he had it and that he was making a debit in accordance with it, and that he wanted us to make a similar debit ourselves.

Mr. Lasky: I wish to strike out all that because it is shown the whole thing is hearsay, everything he has testified to.

Mr. Erskine: If the Court please, counsel permitted him on direct examination to testify with respect to hearsay, and when I want to clear up a situation and show exactly what the instructions to this witness were and what his information was when he directed the charge to be made, the objection is made that it is hearsay. Hearsay works in his favor, but it apparently can't explain—

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: I didn't ask the witness for hearsay, and when he gave it nonresponsively, I moved to strike it out.

The Court: It is hearsay. The motion to strike is granted. [89]

Q. (By Mr. Erskine): Let me put the question to you this way, then, Mr. Tobey: Do you know or were you informed at the time you directed the entry, the charge, to be made against the account of the Merchandise National Bank upon the basis of the debit ticket, plaintiff's exhibit 2—did you know or were you informed at that time that there was in the hands of the Bank of America defendant's exhibit A for identification, which I am now showing you. The answer to that can be yes or no.

Mr. Lasky: If the Court please, any conversations or information passed between the offices of the Bank of America internally where no representative of the defendant was present would be immaterial and not binding upon this, and I object to it upon that ground.

Mr. Erskine: If the Court please, counsel asked the witness whether or not a charge was ever made against the account of Merchandise National Bank with the Bank of America which was not supported by some paper that was issued by the Merchandise National Bank. That was one of the questions that counsel put to the witness. The witness answered the question yes, that no charge was made against the account of Merchandise National Bank in a collection of this sort unless the Bank of America

(Testimony of Lloyd J. Tobey.)

had in its hands some paper to support the charge. The witness directed the charge to be made. Counsel wants to show that the witness made the charge without anything supporting it, [90] without any information or knowledge as a basis for the debit entry which he has offered in evidence. I want to show now, in explanation of the situation, what the witness knew about the facts, whether the witness knew that there was in the hands of Bank of America at the time the debit entry plaintiff's exhibit 2 was prepared by him, a paper from the Merchandise Bank supporting the charge. I think I have a right to do that. Counsel talks about an unusual entry, calling for the conclusion of the witness whether or not the entry was unusual. I want to explain the circumstances under which the entry was made. I want to show the knowledge and information that were in the possession of this witness at the time he prepared the debit ticket, plaintiff's exhibit 2.

Mr. Lasky: If the Court please, to save time, I will stipulate that the advice of credit which has been marked—has it been given a number?

Mr. Erskine: Defendant's A for identification.

Mr. Lasky: —was in fact received at East Bakersfield on the morning of the 19th. There is a stamp on it which shows it was received about nine o'clock in the morning. That is a fact that we are going to bring out ourselves very shortly. But what I object to are internal conversations that

(Testimony of Lloyd J. Tobey.)

went on between officers of the Bank of America on the subject.

The Court: It would seem to me that when you are dealing with complicated book entries which proceed from one department [91] to another and from one branch to another, that you are necessarily in the course of business required to rely upon the statements and the information obtained by one department in order for the other department to operate. Isn't that the situation?

Mr. Erskine: That's right. That is exactly it.

The Court: In other words, you want to limit the proof just to what this man as an individual knows. It is the bank that is operating. It is the bank that is here involved, and it is the combination of all its employees.

Mr. Lasky: Quite true, but I proved through this witness that what happened here was an unusual charge, out of the ordinary course of events.

The Court: Well, he can explain the unusual charge. He can explain how it came to be. Objection is overruled.

The Witness: May I explain the unusual thing?

Mr. Lasky: Wait a minute now. The last question that was put to you, the reporter will read it to you.

(Question was read by the reporter.)

A. Yes.

Mr. Erskine: I would like to offer in evidence, if your Honor please, defendant's exhibit A.

(Testimony of Lloyd J. Tobey.)

The Court: Is there an objection?

Mr. Lasky: No objection.

The Court: It is so admitted. [92]

The Clerk: Defendant's Exhibit A in evidence.

Mr. Erskine: This is an important document in the case. I would like to submit this to the Court for its examination. I would like to have the witness explain to the Court the purport of such a document, Defendant's Exhibit A, in the course of the banking business.

Q. What was that, Mr. Tobey?

A. In the course of the banking business, when a bank forwards a check or draft or other instrument for collection, they initiate an instrument similar to this, representing an outgoing collection form, and forwarded it to the collecting banks. When—

Q. The paying bank or the collecting bank?

A. The paying bank, and when—and on that collection form they state how they want to know about whether it has been paid or not; they may ask that its fate be wired, or that payment be notified by mail, and they would also instruct the branch as to what to do with the proceeds, such as credit their account, or remit to them by draft or cashier's check, or send the money to other banks for credit in their account, and then when that notification of payment is received in the form of an advice, by telegraph if they requested wire fate, or by a notice such as that if they ask for mail fate, they thereupon debited the bank that sent them

(Testimony of Lloyd J. Tobey.)

this notice of payment and they credited the money to their customer or they paid [93] the money to their customer in cash or disposed of it in any way that they were instructed to do by the person who gave them the instrument which has been sent for collection.

Q. (By Mr. Erskine): I think, Mr. Tobey, counsel asked you with respect to the words deleted on this Plaintiff's Exhibit 1, the words that are exed out in typewriting, and you said that those were "to protect his debit." Now would you explain what those words meant, "to protect his debit"? Whose debit?

A. That was Mr.— that was the East Bakersfield branch's debit.

Q. Mr. Etribou's debit?

A. Mr. Etribou's debit.

Q. As manager of the East Bakersfield branch?

A. As manager of the East Bakersfield branch.

It was to protect his debit.

Q. What do you mean by that?

A. A debit which he made up on a regular form that he would ordinarily charge the bank that had credited his account for the collection, and he said that—as I previously stated, that he was making that debit, it being sent through in the regular course.

Q. That is, he told you he was making it?

A. He told Mr. Schilling that.

Q. A debit of the East Bakersfield branch which he was sending, as I understand it, to the office of

(Testimony of Lloyd J. Tobey.)

the Bank of America in [94] San Francisco, which was an instrument to debit the account of the Merchandise Bank with the six checks, is that right?

A. That is correct.

Mr. Lasky: Just a moment, please. Suppose the witness says that Mr. Etribou told Mr. Schilling that, I object to it on the ground that it is hearsay. If these internal communications may be proved, they should be proved by the people who participated in them, not by someone who was told about them.

Mr. Erskine: Counsel asked him about the words stricken out on this document, Plaintiff's Exhibit 1, and I was just getting him to explain what he meant by these deleted words.

Mr. Lasky: I didn't object to that, but then he went on to give a conversation that went on between Etribou and Schilling.

The Court: Yes; as I understood it, you went into a different conversation that doesn't explain that in any fashion. I will sustain the objection.

Q. (By Mr. Erskine): Let me put it to you this way then, Mr. Tobey: When you put on this Plaintiff's Exhibit No. 1 the words, "to protect his debit," which words were then stricken out, what did you mean by those words?

A. I had in mind that a debit was coming through, and that we should protect it so that when it was received there would be funds there to cover it.

(Testimony of Lloyd J. Tobey.)

Q. When you said a debit was coming through, what did you mean [95] by that?

A. The practice is that when they make a debit at a branch for collection, they send it through on a cash letter to the other branch, and it represents a debit to the account and then it is offset against the account of the person—of the bank or customer named.

Q. In other words, the debit ticket made out at the branch in this instance was what sort of a debit ticket?

Mr. Lasky: Pardon me; the debit ticket will speak for itself; you have it here. The witness has testified that he did not have it and did not get it for several days after he made his entry.

Mr. Erskine: I am still trying to get him to explain its use.

The Court: That is true. If the debit ticket is here, put the debit ticket in evidence.

Mr. Erskine: Yes. Have you got that debit ticket?

The Court: On which the entry was made.

Mr. Erskine: Get that debit ticket, Mr. Tobey.

Mr. Lasky: Of course the testimony is that it was made on this debit ticket before the other one ever arrived, several days before it arrived.

Mr. Erskine: Would you mark that, please?

The Clerk: Defendant's B for identification.

(Whereupon debit ticket was marked defendant's B for identification.) [96]

(Testimony of Lloyd J. Tobey.)

Mr. Erskine: Showing you this Defendant's Exhibit B for identification, Mr. Tobey, I will ask you what that is.

A. This is one of our standard debit forms for use by our branches in charging banks to which it has sent collections upon—this says, "Collection Debit" at the top, and then down below it says, "Debit Merchandise National Bank."

Q. With respect to this particular debit, just explain from what branch of the bank that came, to what branch of the bank it was directed, and what directions it gave the branch to which it was directed.

Mr. Lasky: Can't I stipulate with you about that?

Mr. Erskine: Yes, go ahead.

Mr. Lasky: I will stipulate that this document that was marked Etribou 12, is it?

Mr. Erskine: I am not sure.

Mr. Lasky: I want to be sure I am talking about the same instrument.

The Witness: That is correct.

Mr. Lasky: I will stipulate that this is a document which was mailed out from the East Bakersfield branch of the Bank of America late on the 19th or on the 20th, but which arrived in San Francisco at the head office on the 22nd; and as for what it is, it speaks for itself.

Mr. Erskine: That is not exactly clear upon the face of it. I don't know exactly when it was mailed from the East Bakersfield branch, and therefore I

(Testimony of Lloyd J. Tobey.)

can't accept your stipulation. [97] It is dated November 19, 1948.

Mr. Lasky: It has got a perforation through it which shows arrival in San Francisco on November 22.

Mr. Erskine: The 19th—

Mr. Lasky: So testified by Mr. Tobey.

Mr. Erskine: The 19th was Friday, the 20th was Saturday, the 21st was Sunday, and the 22nd was Monday, as I remember it.

The Court: Have you agreed upon that stipulation?

Mr. Erskine: I can't agree with it, your Honor, because I don't know when it was mailed.

The Court: Are you going to put any proof in as to when it was mailed?

Mr. Erskine: I think that will come out later.

The Court: Very well.

Q. (By Mr. Erskine): Just explain what that is, Mr. Tobey, will you? What is the use of that?

A. I think I have already explained that this is a standard debit form from the different branches in debiting banks for collection proceeds.

Q. What special use was that used for?

A. In this particular case when this debit was received in San Francisco, it was not debited to the account of Merchandise National Bank, but it was debited to the account of suspense liabilities.

Q. Well, the direction was a direction from the branch to the [98] central office of the Bank of America to debit the account of the Merchandise

(Testimony of Lloyd J. Tobey.)

Bank with \$113,000 odd dollars on account of the six checks that are the subject of this litigation; that is correct, isn't it? A. That is correct.

Mr. Lasky: I move that that go out. It calls for his conclusion. The document speaks for itself as to what it is.

Mr. Erskine: All right. I ask that this be admitted in evidence, if the Court please, as Defendant's Exhibit B.

The Court: Is there objection?

Mr. Lasky: I have no objection.

The Court: Very well. It may be so admitted.

The Clerk: Defendant's B in evidence.

Q. (By Mr. Erskine): Now, Mr. Tobey, on your direct examination you were asked whether or not the debit ticket that has been marked here Plaintiff's Exhibit 1 was a direction of an unusual entry, and your answer was yes. Will you please explain in what respects the entry was unusual?

A. It was unusual in that we had a telephone request to put it through, and that we put it through and credited it to suspense liabilities in anticipation of the debit which would be received from the East Bakersfield branch. It is unusual in that you don't have items of that kind every day. These debits that we just looked at—this last one—come through in the regular course and are debited to the correspondents or the [99] bank's account. However, we do have occasions when we are called upon by telephone or by wire to take certain actions in anticipation of other actions, and we have to take the

(Testimony of Lloyd J. Tobey.)

money and put it in some place, in some account, to meet the incoming item.

Mr. Lasky: I move to strike out that answer beginning with "There are cases that you have to do thus and so" as being the witness' argument on the subject. He has explained that this was unusual in this case for certain reasons. He has already given those reasons. He is giving his argument.

Mr. Erskine: It relates to the question whether it is unusual.

The Court: Overruled.

Q. (By Mr. Erskine): The entry made upon the basis of this Plaintiff's Exhibit No. 1 was to charge to suspense liabilities was it? A. Yes.

Q. Was that charge to suspense liabilities reversed thereafter?

A. No, this was—the original entry when we debited the Merchandise National Bank was offset by a credit to suspense liabilities. The funds were held there until this debit came in from the East Bakersfield branch, and by being debited to suspense liabilities, it offset the credit, and the account was cleared.

Mr. Erskine: No further questions. [100]

Redirect Examination

Mr. Lasky: Just a moment. Just one or two questions.

This episode where you, on your own responsibility, caused the charge to be made to the account of Merchandise National Bank for 113,000 is the

(Testimony of Lloyd J. Tobey.)

first time a charge was ever entered to the account of Merchandise National Bank on a collection item at the head office without having from the branch some kind of written instructions, is that right?

Mr. Erskine: Just a second. I object to the form of that question. It includes the words "on his own responsibility."

Mr. Lasky: He has testified to that.

Mr. Erskine: Well, that was included in the previous question that you put, and I didn't object to it because I didn't want to be captious; but the fact is this: that the testimony of the witness shows that Mr. Etribou telephoned to Mr. Schilling; that Mr. Schilling, before he gave this witness instructions—

The Court: Counsel, there is no use of you testifying at this point. Counsel is entitled to ask the question if he did it on his own responsibility.

Mr. Erskine: Yes.

The Court: It is up to the witness to answer. The witness can answer the question as to whether it was on his own responsibility or otherwise.

Mr. Lasky: He has already so testified.

The Court: Well, he can answer the question. It can be [101] further developed if it is necessary. Proceed. Read the question to the witness.

(Question read by the reporter.)

A. I couldn't testify to that; I don't know.

Q. (By Mr. Lasky): The first time you ever caused such a charge to be made, I assume?

(Testimony of Lloyd J. Tobey.)

A. The first time that I caused the charge—

Q. Yes.

A. But your question wasn't that, as I recall it. It was the first time, at any time such a charge, and I couldn't testify to that.

Q. You do testify, do you not, that it was the standard practice in the case of correspondent banks that no charge in case of a collection should be made against the correspondent's account at the head office until some debit item came up from the branch where the collection originated? That was the standard practice, was it not?

A. That was the standard practice.

Q. And it was standard practice that the branch would not send out any such instructions to the head office until it in turn had received some written paper from the correspondent bank authorizing it to do so; that is true, too, is it not?

A. That is true.

Q. And this is the first time, to your knowledge, where a charge was made against the account of Merchandise National Bank on a [102] collection item without waiting for something in writing to come up from the branch? I am only talking about your own knowledge, of course.

A. My own knowledge, right; but I don't want—may I explain, your Honor, that I don't want to leave the impression that such event could not happen, because we are a large organization and there are lots of transactions; it may be to leave that im-

(Testimony of Lloyd J. Tobey.)

pression would be wrong. And may I also, your Honor, explain that responsibility apparently raised the question, and I would like to enlarge my statement, that I carried out Mr. Etribou's instructions which had been conveyed to me on my own responsibility.

Q. Just a moment, Mr. Tobey. You remember your deposition was taken? A. I do.

Q. Do you not remember testifying—and I call your attention, counsel, to page 19 of his deposition—that you talked to Mr. Schilling, and that you then made the entry "on my responsibility"; is that correct? "I made the entry on my responsibility." I read from your deposition, page 19, line 9.

A. That is correct.

Q. Now, Mr. Tobey—

The Witness: I think that can be enlarged—

Mr. Erskine: Would you mind reading, counsel, as long as you refer to the deposition, would you mind reading all the way [103] down from 5 down through 10?

Mr. Lasky: Yes, I don't mind reading that. "I did discuss it, however, with Mr. Schilling as the counsel, as to the position of the bank in the matter and whether it would be legally justified in making the entry. "Q. Did he tell you to make the entry? A. He compared with me in making the entry. I made the entry on my responsibility. He told me that I could legally do so."

Q. Now, Mr. Tobey, the subject matter of the \$113,216.50 first came to your personal attention

(Testimony of Lloyd J. Tobey.)

about two o'clock in the afternoon of November 19, 1948, did it not? A. That is correct.

Q. When Mr. Kenneth Johnson of your bank's legal department, and Mr. Libby, branch supervisor whose jurisdiction contains the Bakersfield branches, came to you in your office in San Francisco; correct? A. That is correct.

Q. They told you that there was a matter which involved a collection item and that it had been discussed between Mr. LeRoy of the Merchandise National Bank the day before with Mr. Duncan of your banks and bankers division and with Mr. Johnson, is that right?

A. I don't recall them saying that. They did come to me.

Q. Now perhaps your memory has faded a bit since your deposition. I will call your attention merely to page 18, line 15: "I [104] can't recall the words at that time, but I am sure—I feel sure that they told me that it involved this collection item, and they told me that had been discussed by Mr. Duncan, Mr. LeRoy and Mr. Johnson on the day previous and that it could result in a loss." Is that correct? A. That is correct.

Q. So they told you that it could result in a loss to your bank? A. That is correct.

Q. And they also told you at that time unless the \$113,000 could be credited to Lofendo's account, that account would show an overdraft of \$82,000 odd dollars and Bank of America would suffer a loss in that amount, is that right? A. Yes, sir

(Testimony of Lloyd J. Tobey.)

Q. And it is a fact, of course, that unless the \$113,000 was so credited, there would have been such an overdraft uncovered?

A. That is correct.

Q. Following the 19th you went down to Bakersfield and you personally made an investigation of the records there and you can testify to that of your own knowledge now, can you not?

A. Yes.

Q. You were told of this before talking to Mr. Schilling of your legal department that afternoon; that is right, is it not? A. That's right.

Q. Then it was later in the day after you had been told this by Mr. Johnson and Mr. Libby that you personally caused that [105] \$113,000 to be charged against the Merchandise account—I am getting time relationships now—is that right?

A. That's right.

Q. At the time you caused this charge to be made, no one had told you, had they, that on the day before Mr. LeRoy had told Mr. Johnson of your legal department and Mr. Duncan of your banks and bankers division, that the advice of credit was revoked and was not to be acted upon when received? Nobody had told you that at the time you made the debit charge?

A. That is correct.

Q. And also at the time you made that debit charge, nobody showed you, nor did you know anything about a certain letter which Mr. LeRoy had

(Testimony of Lloyd J. Tobey.)

given to Mr. Duncan the day before, is that right?

A. That's right.

Q. You learned of that letter some days after you made that charge; is that correct?

A. The next day, as I recall it.

Q. And at the time you took it upon yourself to make that charge, you didn't know anything about—nobody had told you about the letter which Mr. Duncan had written the day before to Mr. Etribou instructing Mr. Etribou to follow the directions of Mr. LeRoy? You knew nothing about any such letter? A. That is correct.

Q. So that when you took it upon yourself to make this charge against the Merchandise account there were a series of things to [106] which we have just referred of which you were wholly ignorant and of which you didn't learn until the next day? A. That is correct.

Mr. Lasky: That is all for the time being, Mr. Tobey.

Recross-Examination

By Mr. Erskine:

Q. And had you at any time prior to November 19, 1948, ever had anything to do with the account—the "due to" account of the Bank of America, with the Merchandise National Bank?

A. No, sir.

Mr. Erskine: That is all.

The Court: Very well, gentlemen. I think we have probably arrived at a time to take a short

(Testimony of Lloyd J. Tobey.)

recess. The Court will stand in recess until 25 minutes after 3:00.

(Recess.)

Mr. Lasky: If your Honor please, a matter has just been brought up by both counsel representing the inter-pleaded defendant, Cy Mouradick and the trustee in bankruptcy of the United Produce Company. They would rather not be sitting around the courtroom as the controversy between the two banks goes on. They wish to be excused, and I understand they agree that wherever Mr. Erskine and I stipulate to testimony or evidence to hasten it along, it may be deemed to be their stipulation, and they will then return to the courtroom whenever they think it appropriate to protect their own interests. [107] Is that correct?

Mr. Bianco: That is substantially correct. My name is Mr. Bianco. I represent Mr. Mouradick, who is an attacking creditor. The interests of my client do not come into effect unless the Bank of America is successful in the litigation, at which time there would be a credit in the Lofendo account in the East Bakersfield branch of some \$30,000, and I understand Mr. Bradley's position; he represents the trustee in bankruptcy of the United Produce Company and his interests do not come into play unless the Bank of America is successful, in which event then he and I will probably have to litigate who has the prior right.

The Court: Then it will be at the conclusion of

all the evidence between the plaintiff and the defendant?

Mr. Bradley: That is correct, your Honor.

The Court: You wish then to put some evidence in?

Mr. Bradley: If the Court should find in favor of the Bank of America, then Mr. Bianco and myself on behalf of our clients would want an opportunity to present our cases, our claims to the \$30,000.

The Court: Of course, I do not anticipate I am going to be able to decide this matter from the bench at the conclusion of the evidence.

Mr. Bianco: Then your Honor may want to set a definite hearing some time after that [108] decision.

The Court: At the conclusion.

Mr. Bianco: That is satisfactory.

Mr. Bradley: At the conclusion of all the other evidence then Mr. Bianco and myself could come in and put on all our evidence to support our claims.

Mr. Bianco: As I understand His Honor, he may want to defer that until he has decided the case as between the two banks.

The Court: No, I don't think so. I think I will hear the evidence before a decision is made.

Mr. Bianco: That is satisfactory.

Mr. Erskine: I will keep you advised as to when that time is arriving.

The Court: If you are otherwise satisfied as to the situation, it is up to you to protect yourselves. You have my permission to absent yourself.

Mr. Bianco: Thank you, your Honor. And so far as the record is concerned, so far as any stipulation as to the facts material to the determination of the case between the two banks is concerned, I will join in any stipulation made by those two counsel.

Mr. Lasky: One stipulation Mr. Erskine hope to enter into regarding the relationship between the defendant and the United Produce Company may also have a bearing upon your interests.

Mr. Bradley: That particular stipulation you mentioned, if it amounts to a stipulation that United Produce Company was [109] engaged in fraud, I do not know that I could say offhand now that I could join in.

Mr. Lasky: We will submit the proposed stipulation to you beforehand.

Mr. Bianco: Very well. We certainly would not want to stipulate ourselves out of court to this statement you are now making. My thought was as far as those stipulations that may be necessary for the determination of the controversy between the two banks we raise no objection to.

Mr. Lasky: Very well. Then if that issue should arise later, if we ever get to the later point, we will handle it when we get to it.

The Court: It is perfectly agreeable with me. As I say, it is your responsibility in the matter.

Mr. Bianco: Thank you, Your Honor.

Mr. Bradley: Thank you.

Mr. Lasky: One correction, if the Court please. I am informed I misspoke myself in a question to Mr. Tobey at the end where I asked him if he

knew about a certain letter of Mr. Duncan, and I am advised I said, "To Mr. Schilling." I meant to say, "To Mr. Etribou."

Mr. Erskine: I will stipulate that that can be changed.

The Court: And the answer is the same.

Mr. Erskine: And the answer is the same.

The Court: Very well. [110]

FRANK ESTRIBOU

called as a witness on behalf of the plaintiff under Rule 43 (b), Rules of Civil Procedure, was sworn and testified as follows:

The Clerk: Will you state your name to the Court, please?

A. Frank Etribou.

Mr. Lasky: I am also calling Mr. Etribou as an adverse witness under Rule 43(b).

Direct Examination

By Mr. Lasky:

Q. Mr. Etribou, you are manager of the East Bakersfield branch of the Bank of America?

A. I am.

Q. And you have been that for over 15 years?

A. Correct.

Q. The Merchandise National Bank, the plaintiff in this case, has never had an account with your branch? A. Never to my knowledge.

Q. But in 1948, your branch did have a commercial account which stood in the name of one Frank C. Lofendo? A. That is correct.

(Testimony of Frank Etribou.)

Q. Which had been opened up on March 12, 1948, correct?

A. I couldn't verify the date without looking at the records. The signature card will indicate the date it was opened. [111]

Mr. Erskine: I will stipulate that is so subject to correction.

Mr. Lasky: I have the signature card. If you can verify it right now, we can get the stipulation and pass on.

Mr. Erskine: March 12, 1948.

The Court: Very well. It is so stipulated.

Q. (By Mr. Lasky): Mr. Lofendo was a stranger to you, was he not? A. Correct.

Q. As a matter of fact, you met him only once?

A. Just once, at the time the account was opened. [112]

Q. And never thereafter? A. Never.

Q. Stranger to everyone in the bank, was he not? To all your officers?

A. To the best of my knowledge, yes.

Q. It is a fact, is it not, from time to time, checks for deposit to the Lofendo account or for collection were received by your branch through the mail? A. That is correct.

Q. And these checks would arrive in an envelope or envelopes addressed to the bank, which envelopes contained checks and duplicate deposit slips?

A. I learned of that afterwards. I had nothing to do with the incoming mail.

(Testimony of Frank Etribou.)

Q. You know it to be the fact that all but the original opening of the deposit of March 12th did come in by mail? A. But what?

Q. The original opening?

A. The original was cash over the counter, that is correct.

Q. And everything thereafter was by mail?

A. Yes.

Q. It is a fact that from time to time checks were drawn by United Produce Company to the order of Frank C. Lofendo for delivery to your branch for collection?

A. Mailed to us. [113]

Q. Mailed, yes, and received and accepted by your branch for collection only, correct?

A. In some cases, yes. Some were immediate credit.

Q. I have not asked you about the immediate credit. I asked you is it a fact from time to time there were checks which you accepted for collection only? A. Correct.

Q. And on such items, that is, checks which you received for collection only, your branch passed no credit to the account until and unless the checks were collected and the funds received?

A. If they were handled for collection, yes.

Q. That is the way it was done. If they were handled for collection, no present credit?

A. That is correct.

Q. And no credit until credit was effected.

Mr. Erskine: Just a second. That calls for the

(Testimony of Frank Etribou.)

conclusion of the witness, your Honor, and it is getting to an important phase of this matter. What is meant by "collection effected"? That is the conclusion for which he is calling. That is a legal matter which this Court has to decide. I would rather have Mr. Lasky state the facts that he wants to show and I think I can agree to them. I do not want him to call for conclusions of this witness that might be binding on us in some way.

Mr. Lasky: I think the witness has already answered the—— [114]

The Court: The Court understands that, and any conclusions of the witness are going to be disregarded by me in any event, but it does seem to me you can stipulate as to the facts of the transactions and the method in which this account was handled. You both apparently have the knowledge. Why have the witness sit up here for the next half hour and tell me all about it when you can make a stipulation in a page or two to cover the whole thing? Of course, the conclusions—you can't stipulate as to the conclusions any more than the witness can testify as to conclusions, but as to the facts—it seems to me, gentlemen, really that we might very well spend a few hours together in chambers, and if you will outline the testimony you intend to produce step by step, you may very well stipulate as to what the facts are. As to conclusions, of course, that is another matter. It seems to me if some thought is given to this matter we can eliminate a tremendous amount of proof and

(Testimony of Frank Etribou.)

it might be well, if you think that is a proper method to pursue, we might stop as of this time, you gather your own thoughts together on the matter, and tomorrow morning, instead of having some witnesses here, let up spend tomorrow morning in chambers seeing what we can do to eliminate unnecessary proofs.

Mr. Lasky: I think a lot can be done but I think it would be done, if you will pardon me for saying so, more expeditiously as we go along with the witnesses. I can stop from time to [115] time and state a stipulation.

The Court: The witness is on the stand here now and everything he has so far testified could be stipulated to. If you fellows would stipulate, you wouldn't be here at all but all you do is dictate a stipulation, prepare one, file it and I could read it. I am in favor of eliminating the continual questions and answers. It doesn't help me. That is what you are up against. You are up against my deciding the thing, and it isn't going to help me to have witnesses up here testifying on things that there is no issue about. I will do a lot better if I have a stipulation and can look at it and decide, "Now, that is out of the picture. This is the fact, what is the answer to that if that is the thing I have to decide?" I sit back now and have to listen to him, and when I get into chambers I will say, "What did he testify to?" Then I have to go and get the record, and I have to read that. If it is in the form of a stipulation of facts, it is a simple matter. I

(Testimony of Frank Etribou.)

will tell you, you are going to facilitate the trial and the decision a great deal if we can eliminate it. I would suggest that we recess at this point, that counsel spend some time together right now discussing the matter and the proofs that each expect to present, and see what you can do, and then tomorrow morning come to chambers and then let us all go over it together and see what we can eliminate.

Mr. Erskine: That would be entirely agreeable to me, and [116] I think a great many facts and a great many documents could be agreed on.

Mr. Lasky: We have no trouble with documents.

The Court: Documents—as far as they are concerned, we do not need the documents. You can stipulate as to what the documents show, the particular documents. What is the use of piling the records up here with ledger after ledger, or whatever accounts you are going to show, when all you have to do is say there was an account showing a certain thing?

Mr. Lasky: I think what your Honor says is correct in major part. We always come, sooner or later, to places where we differ in the inferences—

The Court: The inference, whether the proof is put in by stipulation or by what the witness says on the stand, is the same thing. The Court has to draw the inference, and the one is just as much evidence as the other.

Mr. Lasky: Your Honor, I assume, may want, when you may reach the point where you desire, to

(Testimony of Frank Etribou.)

know the credibility of witnesses where there is a conflict.

The Court: Oh, of course. When you get to those matters in which there is a real conflict—you have talked about conversations that were had, where one says one conversation occurred and another says another conversation. That is a matter the Court must reasonably look at the witness and find out and see himself. There may be some questions that he wants [117] to ask after you are through asking questions. That evidence will be put on here. But the other matters, there is no real conflict on, and it is just a question of me drawing an inference from the record or the general procedures in the business.

Let us eliminate all of that, and I think it would be well for you to spend some time together before you get into chambers tomorrow.

Mr. Lasky: We can sit down now and talk it over.

The Court: If you will come to chambers, say, at ten o'clock tomorrow morning, and we won't have a session of Court until tomorrow afternoon. It may be in two or three hours tomorrow morning we might really accomplish something, and so on that basis the Court will stand at recess at this time until two o'clock tomorrow afternoon, and you gentlemen come to chambers at 10 o'clock tomorrow morning. [118]

Friday, June 16, 1950—2:00 P.M.

The Clerk: Merchandise National Bank vs. Bank of America, on trial.

Mr. Lasky: If the Court please, I understand, of course, while Mr. Bianco is not physically in court, he doesn't need written notice. I presume also that Mr. Erskine is daily in touch with him, and I would request Mr. Erskine to notify Mr. Bianco to be present on Monday, because the attorney for the trustee in bankruptcy of United Produce Company and I desire to make a motion with respect to Mr. Mouradick in the case.

The Court: Will you be in touch with him? That is the simplest way.

Mr. Erskine: I can call him. I saw him in court the other day. He told me that he was going to be trying a case in Bakersfield Monday, a jury trial. I know he won't be able to be here.

Mr. Lasky: Then we can defer it. Request him to be here when he can.

Mr. Erskine: That is all right.

The Court: There will be no prejudice because the man wasn't here at a particular time. The time element is not going to interfere.

Mr. Erskine: I'm afraid that will be later next week.

The Court: I don't suppose, or do you have in written form [119] the stipulation with reference to which we talked this morning?

Mr. Lasky: No, it isn't ready yet. I assume that we may proceed upon the assumption that it would come in.

The Court: Proceed on the assumption that it is now in.

Mr. Lasky: It may be in the record later, but for the time being we will presume it is in. The written stipulation will be in Monday. We will get the written stipulation in Monday.

Mr. Erskine: The one we discussed this morning?

Mr. Lasky: Yes.

Mr. Erskine: As soon as you write it up, send it over.

The Court: We will presume it has been made for the time being. Proceed.

Mr. Lasky: Yes.

Mr. Erskine: That is right.

Mr. Lasky: For the sake of the record, I think it should be shown that Mr. Etribou who was on the stand has been withdrawn without prejudice to calling him back later.

The Court: Very well.

Mr. Lasky: Mr. Messenger, will you take the witness stand, please?

FREDERICK C. MESSENGER
called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court?

A. Frederick C. Messenger. [120]

Direct Examination

By Mr. Lasky:

Q. What is your residence, Mr. Messenger?

(Testimony of Frederick C. Messenger.)

- A. In Park Ridge, Illinois.
- Q. Near Chicago?
- A. A suburb of Chicago.
- Q. And what is your occupation?
- A. Banker.
- Q. With whom are you employed?
- A. Merchandise National Bank of Chicago.
- Q. In what capacity?
- A. Vice-president and controller.
- Q. How long have you had that position?
- A. Since January, 1949.
- Q. Were you controller before you were vice-president and controller? A. Yes, I was.
- Q. For how long have you been controller?
- A. From 1942.
- Q. And prior to that date were you with that bank? A. I was.
- Q. In what capacity? A. Auditor.
- Q. And prior to your employment with the plaintiff Merchandise National Bank, how long have you been a banker? A. Since 1913. [121]
- Q. What positions have you occupied with other banks and banking organizations?
- A. The position of auditor, controller, vice-president, executive vice-president.
- Q. Have you ever occupied a position as bank examiner for any organization?
- A. I was an examiner for the Federal Deposit Insurance Corporation.
- Q. For how long?
- A. A period of four years.

(Testimony of Frederick C. Messenger.)

Q. When was that?

A. 1933, October, to October, 1937.

Q. Now as auditor-controller of the Merchandise National Bank, what was the character of your duties?

A. I am the chief accounting officer of the bank in charge of operations, systems, the preparation of forms, in charge of all expenditures of the bank, the preparation of budgets, investment program.

Q. And all accounting matters?

A. That is right.

Q. On what day did you learn that a certain advice of credit for \$113,216.50 had been sent out to the East Bakersfield branch of the Bank of America, or to the Bank of America?

A. November 17, 1948.

Q. And will you state the circumstances under which you learned [122] of that fact?

A. On that day—

Mr. Erskine: Just a second, if the Court please. It seems to me that what was told this witness—

Mr. Lasky: Yes, you are quite right. I will instruct the witness I don't want him to tell anything he has been told, but only the things he himself saw and did.

The Court: Very well.

A. On November 17, 1948, three items totalling \$57,000, drawn by Frank C. Lofendo on the East Bakersfield branch of the Bank of America were returned to the Merchandise National Bank for non-payment. On that day the three items were

(Testimony of Frederick C. Messenger.)

presented to me by our collection teller who handles returns.

Q. Then what happened then? And again, just relate what you saw and did, but don't tell me what anybody said to you.

A. At that particular time I referred those three checks to the president of the bank, and likewise to the vice-president of the bank who was handling that account, and that—at that particular moment the matter with reference to those returns was placed in the hands of the vice-president handling that account.

Q. All right. Then what else did you observe yourself?

A. I was in the presence when Mr. Redheffer, our president, instructed Mr. Reichwine to contact—

Mr. Erskine: Just a second. I suppose that that is [123] hearsay, if your Honor please.

Mr. Lasky: Well, it is in the character that your Honor referred to yesterday of what went on internally in the bank, the same as when the message came through the East Bakersfield branch that reached Mr. Etribou.

The Court: Yes. What is it? It is in the nature—

Mr. Lasky: Preliminary to the fact that someone came into the bank, and this witness saw somebody come into the bank.

The Court: It is not to prove the truth of what he said?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: No, not at all; not offered for that purpose.

The Court: Do you have any objection to that on that ground?

Mr. Erskine: I suppose, your Honor, in matters of this sort that something of this nature would come in.

The Court: It has to come in for me to understand it.

Mr. Erskine: In other words, if it doesn't, the story isn't there; but I don't believe the witness ought to testify to what he told Mr. Redheffer or what Mr. Redheffer told him.

The Court: It isn't offered for that purpose.

Mr. Lasky: I can try a leading question, and that will cover it.

Mr. Erskine: All right, go ahead.

Q. (By Mr. Lasky): Did you personally see Mr. Rosenthal, vice-president of the United Produce Company, come into the bank that day? [124]

A. Yes, I did.

Q. Subsequently to the events you have related?

A. That is correct.

Q. Did you see him go into conference or talk with Mr. Redheffer, the president, and with Mr. Reichwine? A. Yes, I did.

Q. You weren't yourself present at that conversation? A. I was not.

Q. Without stating what you were told, I want you to answer this question: Were you thereafter told what Mr. Rosenthal had said to Mr. Redheffer?

(Testimony of Frederick C. Messenger.)

A. Yes, sir, I was.

Q. And after you were told that, did you look into the United Produce account yourself?

A. I personally did.

Q. And was it then that you discovered the \$113,000 collection item that we have talked about?

A. Yes.

Q. Now did you on that day subsequently to what you have just related, have a conversation with Mr. Etribou, manager of the East Bakersfield branch of the Bank of America? A. I did.

Q. And what sort of conversation was it, in person or by telephone? A. By telephone. [125]

Q. When did the conversation occur? What time of day?

A. It started at 4:17 p.m. on that day.

Q. How do you fix the time?

A. Pencil memorandum notes that I have made at the time the conversation was taking place.

Q. Did you dictate out such a memorandum when you hung up the telephone? A. I did.

Mr. Lasky: Now you are familiar with these memos, Mr. Erskine. You know these?

Mr. Erskine: Yes.

Q. (By Mr. Lasky): And I will ask you, Mr. Witness, whether these two sheets that were marked defendant's exhibits 12 and 13 on your deposition in Chicago—will you look at them and tell us whether those are the memos that you referred to?

A. These are the memorandums I dictated after the conversation.

(Testimony of Frederick C. Messenger.)

Q. And how soon——

Mr. Erskine: Would you pardon me one second. I wonder if we could stipulate, just to get this in the record, that the witness is speaking of Chicago time?

Mr. Lasky: Yes, we are speaking of Chicago standard time, central standard time.

The Witness: That is correct.

Mr. Erskine: I would like a stipulation that in November, 1948—as a matter of fact, all during the fall and winter of [126] 1948, up to the first of the year,—California was on daylight saving time.

Mr. Lasky: I believe that to be true, and so stipulate.

Mr. Erskine: So that instead of two hours' difference between Chicago and San Francisco or Bakersfield there was only one hour difference in time.

Mr. Lasky: Well, my mind doesn't function fast enough to know whether it would be one hour or three hours.

The Court: I always miss which direction I am going on that.

Mr. Lasky: But it was daylight saving time in California.

Mr. Erskine: Yes.

Mr. Lasky: We can figure out ourselves later whether it was one hour or three.

Mr. Erskine: We will stipulate then that in November, 1948, when time is mentioned relating

(Testimony of Frederick C. Messenger.)
to occurrences in Chicago it is central standard time.

Mr. Lasky: That is right.

Mr. Erskine: When time is specified about events which transpired in California it was on Pacific daylight saving time.

Mr. Lasky: That is right.

The Court: Very well.

Mr. Erskine: I request that these two memoranda be now marked as plaintiff's exhibits 3A and B for identification.

The Clerk: Plaintiff's exhibits 3A and 3B for identification. [127]

Q. (By Mr. Lasky): Now I don't know whether I asked you this: How soon after the telephone conversation was over did you dictate those two memoranda?

A. It was only just a short time. The dictation took place at 4:30 p.m.

Q. Now without referring to the memoranda, will you state who put in the telephone call?

A. I put in the telephone call through our telephone operator.

Q. And whom did you ask for?

A. I asked for the manager of the East Bakersfield branch, Bank of America.

Q. Now will you relate the conversation as you remember it?

A. I might not be able to keep all the different parts of the conversation just in the order they took place, but when the telephone was answered

(Testimony of Frederick C. Messenger.)

a man who introduced himself to me as Mr. Estri-
bou, manager of the branch, answered the phone.
And I told him who I was. And he said, "Now
hearing that the call was coming in from the Mer-
chandise National Bank, I assumed that perhaps
the conversation would relate to the Lofendo and
the United Produce matters, so I have asked my
accountants to bring all the records of the account
to my desk."

While he was waiting for the records to be
brought to him, I told him that the United Produce
Company had perpetrated a fraud on us or had
pulled a game, I have forgotten which words, and
that it had us over a barrel, and that one of the
officers [128] of the company had admitted to the
Merchandise National Bank that they had pledged
fraudulent accounts as collateral to us.

I told Mr. Etribou that I had a list of a number
of checks that our records indicated had been re-
ceived from Lofendo, and it was my desire to ascer-
tain whether or not any of those checks had been
paid.

Q. Well now, let me interrupt you at that point
to ask you did you have with you then a list of
checks? A. I did have.

Q. What sort of checks were listed on that list?

A. It was checks that had been handled by our
bank through remittances that had covered the pe-
riod from November 4, up to date.

Q. Let me ask you this: By whom were the
checks drawn?

(Testimony of Frederick C. Messenger.)

- A. The checks were drawn by Frank C. Lofendo.
- Q. Over his signature?
- A. Over his signature.
- Q. And who was the payee?
- A. United Produce Company.
- Q. How did they come into the Merchandise National Bank?
- A. They came in as remittances on assigned accounts that were pledged as collateral to the Merchandise National Bank.
- Q. These checks had come into your bank after November 4th?
- A. That is correct; November 4th, and thereafter.
- Q. 1948? [129] A. Yes.
- Q. What had been done with them?
- A. They had been handled through the discount department and had been forwarded to the Bank of America for payment.
- Q. When had you had this list prepared?
- A. The list had been prepared after we had knowledge that a fraud had been perpetrated on the Merchandise National Bank that day.
- Q. With relationship to the time that Mr. Rosenthal of the United Produce Company came into your bank on November 17th, was the list prepared before or after? A. It was prepared after.
- Q. Getting back to the conversation, I think you mentioned to Mr. Etribou that you had such a list before you? A. That is right.
- Q. Will you continue with the conversation?

(Testimony of Frederick C. Messenger.)

A. And I stated that I would call off the amounts and he could inform me whether the checks were paid. He stopped me and suggested that he call off the amounts of the checks that were paid on their records, and that I could check them against the list that I had.

Q. And was that done?

A. He called off the amounts, and I checked off the items that had been paid, and that left a considerable number of items that were still open. [130]

Q. Let me ask you this: As he called off an item that he said had been paid, did you mark it off your list? A. I did.

Q. When he was through did he say that that was all their records showed had been paid?

A. That is right.

Q. After you had marked off the items he called off, did you still have on your list a number of items? A. That is right.

Q. What did they total?

A. In excess of \$500,000.

Q. Let us get back for a moment to your conversation with Mr. Etribou. What else was said?

A. I informed him—I told him that on November 15th we had mailed an advice of credit covering a collection of six checks of Frank C. Lofendo forwarded to us by their branch, totalling \$113,216.50, and that the advice of credit had been sent out in error. I asked him whether or not the advice had been received by him. He told me that the advice had not been received by him. I told him

(Testimony of Frederick C. Messenger.)

that it was our desire that their bank not make any entry on that advice of credit as we were rescinding the credit, and Mr. Etribou told me that he would be happy to work with Merchandise National Bank; that insofar as the Lofendo account was concerned, they had not been paying against uncollected funds, they were in the clear; they had a [131] balance of \$699.02. He stated that they would work with us; they would do anything we wanted them to do; they would pay checks that we would present to them for payment or they would not make entry, whichever we desired.

Q. Now you used the word "we"; are you purporting to quote the "we"? When you say "we," whom do you refer to?

A. The East Bakersfield branch of the Bank of America. I informed Mr. Etribou that it was not our desire that they pay checks, but we were rescinding the advice of credit; the Merchandise National Bank didn't want them to make entry on the credit. Mr. Etribou said, "I agree with you; then we won't make entry."

Q. What further was said?

A. He told me that on that date they had received, I believe he said, four checks.

Q. Pardon me; what date?

A. November 17th.

Q. I see.

A. They had received, I believe it was four checks; I am not certain as to the number, of the United Produce Company from Frank C. Lofendo

(Testimony of Frederick C. Messenger.)

for deposit, the checks totalled \$87,000, and that they were not accepting these checks for deposit or for collection.

Q. And can you recall anything further having been said?

Mr. Erskine: Pardon me; I didn't quite hear that question. [132]

(The Reporter read the record.)

A. He also told me on that date that they were returning an item for some approximately \$21,000, I have forgotten the amount, that was presented for payment on that date, but they were dishonoring it.

Q. (By Mr. Lasky): Now do you recall, without refreshing your memory from a memorandum, anything else that was said?

A. Just this moment I don't recall.

Q. Was there any reference in that conversation to the name of Mr. LeRoy?

A. Oh, yes; I told Mr. Etribou that Mr. LeRoy, one of our vice-presidents, was flying out to California that night and that he would be in Bakersfield the following day and that it was our desire that he deliver to Mr. LeRoy the advice of credit that we had rescinded. Mr. Etribou stated that it was a little problem sometimes getting from the airport to the bank, and that if Mr. LeRoy would 'phone him upon arrival, he would drive to the airport and bring Mr. LeRoy back to the bank.

Q. Now was there any discussion or conversation as to any other outstanding collection letters?

(Testimony of Frederick C. Messenger.)

A. Mr. Etribou told me that they had a balance of \$699.02. He said, "We have two collection letters totalling \$165,000, sent to the Merchandise National Bank of Chicago, upon which we have not received advice of credit or returns." He said, "One of them is the \$113,216.50 that we have been talking about, and there is [133] another one for \$52,000. Those are the only items which we have sent to the Merchandise National Bank which we have not received returns on."

Q. Now at this time have you told everything you can presently remember about that telephone conversation?

A. All that I can remember at this moment.

Q. Now I am going to hand you, with the Court's permission, documents marked plaintiff's 3A and 3B for identification, which you have identified as the memorandums you prepared after the conversation and ask you whether, refreshing your memory from those, there is anything else that comes back to your mind as having been said during the conversation.

A. I believe I have covered it.

Q. All right. Now, Mr. Messenger, at the time you talked to Mr. Etribou on November 17th, did you know that the Bank of America had not yet given credit to Lofendo for the \$113,000?

A. Yes.

Q. And will you explain how you knew that?

A. Well, there were two ways in which I knew. One was the admission of Mr. Etribou that there were two outstanding collections that they had not

(Testimony of Frederick C. Messenger.)

received credit on from us, the \$113,000 and \$52,000 items, and, secondly, it is a practice of banks that when items are sent for collection—

Mr. Erskine: Just a second. If your Honor please, I would like to interrupt the witness. I didn't make any objection to [134] the question because it didn't seem to me to be in proper form. The reasons for the witness knowing whether or not Etribou had taken certain action do not strike me as material, but the practice of the bank in matters of this sort is certainly not material.

Mr. Lasky: Practice of banks.

Mr. Erskine: Practice of banks in matters of this sort is not material. The witness was examined with reference to the conversation between Etribou and the witness. That conversation is offered for the purpose of showing, I presume, that the Merchandise Bank revoked the credit and that Etribou agreed to the revocation of the credit. Now what bearing can the practice of banks have upon that subject? [135]

Mr. Lasky: I will explain that Mr. Messenger, when he advised Mr. Etribou that the advice of credit was revoked, was acting upon that the Bank of America had not received it or acted upon it, and therefore there would be no estoppel standing in the way of revocation. He said he knew it in two ways. He has explained Mr. Etribou told him he had not received it or given credit, and he was about to explain something about the meaning and

(Testimony of Frederick C. Messenger.)

significance of collection letters in the banking industry.

Mr. Erskine: That is a matter for the Court to determine and not for the witness, at least on direct examination, to state. It may be if his state of mind about the situation is inquired into, his understanding with respect to the practice of banks in matters of this sort and the law might be proper cross-examination, but he certainly cannot sit up there and state a legal rule as a reason for believing that the Bank of America had not received the advice of credit.

Mr. Lasky: I am not asking for a legal rule; I want to know the significance of this collection letter.

The Court: The objection is overruled.

Q. (By Mr. Lasky): What is the significance of a collection letter?

A. The significance of a collection letter is that an item is sent out for collection to another bank with a specific request for the collection of the item, and the remittance of the [136] funds either in the form of a check or credit, and on those items, why, generally speaking, no credit has been advanced until after the remittance or credit has been received.

Q. No credit has been advanced by whom?

A. By the sending bank to the customer from whom they received the item.

Q. Does a collection letter differ from a cash letter? A. Yes, it does.

(Testimony of Frederick C. Messenger.)

Q. Will you explain in what respect?

A. A cash letter covers items sent out in normal channels for collection with other items generally; in other words, there is a large group of items going out in one letter. The cash letter requests collection, but there is the right of revocation of any item contained in that letter if not paid. There is a conditional credit granted by the receiving bank to the sending bank conditional upon the payment of the items enclosed.

Q. In the case of the cash letter, does it indicate in the banking fraternity anything with respect to whether or not credit has been entered at the sending end when the matter has gone out?

A. The general indication is that credit has already been extended on the items.

Q. Coming back to the conclusion of your conversation with Mr. Etribou—

The Court: Let me ask you this: Your description of [137] the custom as to what the forwarding bank does with the item after it has forwarded a matter for collection is based upon your experience in the banking business? A. That is correct.

Q. What has your experience been in the banking business with banks on the west coast?

A. The banks I have been connected with have sent items out both by cash letters and collection letters to west coast banks in, oh, hundreds and perhaps thousands of cases.

Q. You have sent collection letters from your bank to west coast banks, but what is your knowl-

(Testimony¹ of Frederick C. Messenger.)

edge of what west coast banks which forward letters of collection to you, what is your knowledge and experience there as to what they do?

A. The general practice, the knowledge that I have is the practice is identically the same with what it is from any other point in the United States.

Q. Upon what do you base that? What has been your experience or what is your knowledge upon which you state a bank on the west coast sending a collection letter does? What has been your experience that would qualify you to say what a bank out here does when a collection letter is sent?

A. I have never been in California before today, but I have over a period of about 13 years been a member of an association of bankers who meet annually each year and we have discussed and redisussed all kinds of banking problems in these association [138] meetings.

Q. (By Mr. Lasky): Is it a national association?

A. It is a national association of bank auditors and controllers.

Q. But in response to the Court's inquiry you do say you have never been in California before?

A. That is correct.

Q. When you had finished your telephone conversation with Mr. Etribou I think you said you had a list that still had a group of high checks on it? A. That is correct.

Q. Totaling how much?

A. In excess of \$500,000.

(Testimony of Frederick C. Messenger.)

Q. Did those checks ever get paid?

A. None of them were ever paid.

Q. Came back to your bank unpaid?

A. That is correct.

Mr. Lasky: I have here a group of checks marked Defendant's Exhibit 11 with various subdivisions thereof with Mr. Messenger's deposition, which was taken in Chicago, and I ask that they be marked at this time for identification as a group.

The Court: Isn't that one of the matters that has been stipulated on as to the amount?

Mr. Lasky: No, I do not think so. It was not covered; we spoke about it but apparently could not stipulate upon it. I do not know why. [139]

The Court: Very well.

(The group of checks referred to was thereupon marked Plaintiff's Exhibit 4 for identification.)

Mr. Lasky: I may say I do not propose to offer these in evidence but I want them identified because it may become necessary to refer to them later on in rebuttal or something of that character.

Q. I show you here a group of checks, Mr. Messenger. I ask you to look them over and tell me whether or not those are the checks which still remained on your list. Here is another one that belongs in there, I believe. You can staple it to there. A. Yes.

Q. The checks just referred to, having been marked Number 4 as a group, were, I think you

(Testimony of Frederick C. Messenger.)

said, received from the United Produce Company by your bank between November 4th and November 17th? A. That is correct.

Q. And in what connection had they been so received from the United Produce Company?

A. I would like to refer to them before I give that answer, Mr. Lasky.

Q. Sure.

Mr. Erskine: The checks?

The Witness: Yes, please. Yes, sir.

Q. (By Mr. Lasky): Will you answer the question? [140]

A. Yes. Those checks were received by the Merchandise National Bank from the United Produce Company, accompanied by a remittance sheet covering payments on accounts assigned as collateral by the United Produce Company to their loans.

Q. When they were received by Merchandise National Bank from United Produce, did they result in any credits of any kind to the United Produce Company account with Merchandise National Bank?

A. They resulted in conditional credits, subject to the right of charge-back if the checks were not paid.

Q. In connection with the loans were there promissory notes taken from United Produce Company? A. Yes, there were.

Mr. Lasky: Mr. Erskine, when we were in Chicago we entered into a stipulation that one note, which was marked Plaintiff's 3 on Messenger's

(Testimony of Frederick C. Messenger.)

deposition, could be taken as typical of the whole group, and the rest of the notes were listed in the deposition. I have had that all copied out of the deposition, and I ask you to stipulate that this note and what I have copied out of the deposition listing the other notes truly reflects all the notes that were in the account at that time.

Mr. Erskine: Subject to a check, I will agree. I am sure it is right. It is a long list.

The Court: Very well. [141]

Mr. Lasky: I will ask that these two documents together, upon the basis of the stipulation as a sufficient authentication, be marked as plaintiff's next exhibit in order.

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 5.)

The Court: Very well. It is admitted in evidence subject to the check here.

Mr. Lasky: I shall not stop to read to the Court the passage of the note, but with your Honor's permission I will briefly state that it provides that the bank has security, not only the security there mentioned, certain accounts assigned, but any and all other properties of the customer, and that any monies which the bank might owe the customer could at any time be applied at once by the bank, either before or after any debts to the bank were due if the bank so desired. In other words, it gave a complete right of turning back all conditional

(Testimony of Frederick C. Messenger.)

credits. We can refer to that later in appropriate argument.

Q. Mr. Messenger, reference has been made to assignments, receivables. Was there a form of assignment used? A. Yes, there was.

Mr. Lasky: Now, I think, Mr. Erskine, you will stipulate that one of these I have here marked in Chicago is the form of assignment which was used with respect to all the receivables assigned?

Mr. Erskine: I will so stipulate. I am sure it is correct, [142] subject to a check.

The Court: Very well.

Mr. Lasky: I ask that this be marked as a specimen example of them all as plaintiff's exhibit next in order. I offer it in evidence.

The Court: It is so admitted.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Lasky: I may call the Court's attention that it has a provision in there:

"The undersigned United Produce Company agrees to endorse, whenever it receives checks from its customers, to endorse them over to the bank for collection and the bank will take them and handle them for collection."

Q. Now, did the United Produce Company in the course of its account with your bank, Mr. Messenger, use a form of deposit slip?

A. Yes, they did.

(Testimony of Frederick C. Messenger.)

Q. I ask you whether this form that I now show you is the form that was used in the United Produce transactions with you?

A. This is the form that was used.

Mr. Lasky: I offer this in evidence as plaintiff's next exhibit.

The Court: It is admitted without objection.

(The document referred to was thereupon received in [143] evidence and marked Plaintiff's Exhibit 7.)

Mr. Lasky: I call the Court's attention to a provision on the back that is called "Agreement":

"In receiving and handling items for deposit or collection * * * all items are credited or cashed subject to final payment in cash or solvent credits."

Again,

"The bank may charge back any item at any time before final payment, whether returned or not."

Again,

"It may decline to honor checks or pay checks drawn against conditional credits."

Mr. Erskine: Are you suggesting that when the checks of the debtor company and the remittance sheets by the bank, the deposit tag from which you just read accompanied such checks?

Mr. Lasky: No, I did not say that. I said the note, the assignment agreement which provides for

(Testimony of Frederick C. Messenger.)
checks to be taken for collection in the remittance account and this agreement altogether form an agreement between the bank and its customer.

Mr. Erskine: The checks involved, the ones marked here for identification, were not accompanied by deposit tags in the form of the exhibit just introduced in evidence?

Mr. Lasky: No, I have not suggested that they were.

The Court: Then what is the materiality of the deposit slip if there were not used in connection with these? [144]

Mr. Lasky: If your Honor please, perhaps we can clarify it with the witness.

Q. How many accounts did you have with the United Produce Company?

A. We had one account.

Mr. Erskine: I object to that as calling for a conclusion of the witness and I ask that the answer go out, because I really did not have time to object.

The Court: The answer may be stricken to permit an objection.

Mr. Erskine: It is really an interpretation which the witness is placing upon the relationship between the United Produce Company and the bank.

The Court: I understand your position, I think, Mr. Erskine, but sometimes you have to hear things in order to explain the facts. You can, of course, examine him with reference to the facts to show that there were more than one account. While you

(Testimony of Frederick C. Messenger.)

say that is a conclusion of the witness, on the other hand it is an ultimate fact that he is just stating, so your objection is overruled at this point. Proceed.

Q. (By Mr. Lasky): Now, Mr. Messenger, in how many different ledgers were the transactions—

The Court: The answer was stricken to permit the objection.

Mr. Lasky: May the answer be restored to the record? [145]

The Court: Yes.

Mr. Erskine: Very well, your Honor.

Q. (By Mr. Lasky): In how many different ledgers or records were the transactions in the account with United Produce recorded or reflected?

A. Four.

Q. Will you state what those were?

A. The checking account ledger, the drafts discounted liability ledger, the notes discounted liability ledger, and the assigned accounts ledger.

Q. What papers would have to be consulted at any particular time, or would you consult at any particular time as auditor to determine the true balance, if any, of United Produce account at any particular date?

Mr. Erskine: Again I object to that, if your Honor please. I suppose it is subject to the same comment that I can try to elucidate it upon cross-examination, but I think it calls for the conclusion of the witness in a material respect. The witness

(Testimony of Frederick C. Messenger.)

can state what accounts were kept, what they were, and then they can be evidenced. But he cannot state, it seems to me, that in determining the balance of credit of the United Produce in the commercial account that he, under the auditing practice of the bank had a right to look at the drafts, discount ledger, the assigned accounts ledger and the note ledger. I do not believe that is a proper conclusion and I do not think [146] the witness should state it.

The Court: I think you just have a controversy with reference to the facts here, Mr. Erskine. I do not see that there is an objection to the witness being able to testify as to what he did do. That is what he is testifying to. As to what records he consulted in order to determine the balance of the account.

Mr. Erskine: The balance to what account? The commercial account?

The Court: He says there is just one account. That is what he says.

Mr. Erskine: That is what he says.

The Court: You can develop that fully. The objection is overruled.

Q. (By Mr. Lasky): Will you state then what papers you, as an auditor, consulted to determine the true balance in the United Produce Account on any particular date?

A. I would have to refer to the four ledgers I just covered, and in addition the deposit tickets supporting deposit entries on the commercial ac-

(Testimony of Frederick C. Messenger.)

count, and the remittance sheets supporting the payments received on the assigned account.

Q. Could I ask you another question? First, before doing that, you are acquainted with this, Mr. Erskine. It was marked in Chicago. Will you stipulate that that is the signature card of the United Produce Company? [147]

Mr. Erskine: Yes.

Mr. Lasky: With the Merchandise National Bank. And I will ask that this be marked and offered into evidence because of the passage there that will make the connection with that deposit slip.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 8.)

The Court: There is no objection, Mr. Erskine?

Mr. Erskine: No, sir.

The Court: Very well. Then it is so admitted.

Mr. Lasky: If the Court please, the signature card of Merchandise National Bank of Chicago, Chicago, Illinois, reads:

"The undersigned duly authorized to act in the premises for and in the name of the organization hereby accept and agree that it shall henceforth be bound by the agreements recited in all deposit books now or hereafter furnished by your bank for this account and as well all bank rules and regulations governing both the account and the handling of items of it as fully

(Testimony of Frederick C. Messenger.)

as if the same was set forth verbatim herein and executed in the organization's name and behalf."

This is signed by Mr. Rosenthal and Mr. Oddo of the United Produce Company.

Q. Now, Mr. Messenger, we looked in Chicago, you will remember, Mr. Erskine, we looked in Chicago for a copy of the deposit book [148] which was in use at the time in November, 1948, and we couldn't find it.

Mr. Erskine: We couldn't find it. I asked for it and they couldn't find it.

Mr. Lasky: Correct.

Q. Were you able to find the book that was current at that time in November, 1948?

A. No, we have not.

Q. Do you recall whether or not the agreement which appears on the back of the deposit tag which has been marked here as Plaintiff's No. 7 is the agreement printed in the deposit book which was used at that time? A. Yes, that was a fact.

Mr. Lasky: I think, if the Court please, that makes the connection of tying in that deposit book with all the transactions of the United Produce Company.

Q. Now, Mr. Messenger, I will ask you this question: You have referred to conditional credits which were entered on the basis of these checks which came back from the Bank of America and which were on your list when you talked to Mr.

(Testimony of Frederick C. Messenger.)

Etribou. Deducting those conditional credits entered on the basis of those checks from the United Produce account, was there any apparent credit on the books against which to pay the \$113,216.50 on November 15, 1948, or thereafter?

Mr. Erskine: Just a second. I object to that as incompetent, [149] irrelevant and immaterial. I make the objection more for the record to make my point. I won't read any authorities. I have them here. The evidence is really being offered for the purpose of showing there was no credit balance against which these checks were paid.

Mr. Lasky: No true credit balance.

Mr. Erskine: Therefore the checks were paid or entered as debits by mistake, and that for some reason or other the Bank of America is bound by the mistake made by the Merchandise Bank. We take the position that under the law the fact that the Merchandise Bank may have paid the checks by mistake when there was no credit balance to the credit of the United Produce Company does not make any difference whatever. We take the position that under the law in commercial transactions of this sort the bank is bound by the payment, subject perhaps to the agreement stated here that it has the right to reverse the entry within one day after the payment, but that after that time it is bound, and therefore this evidence that is now being offered is incompetent, irrelevant and immaterial because it relates to the subject I have just stated, and the law is what I have just stated.

(Testimony of Frederick C. Messenger.)

The Court: Very well. I will reserve my ruling upon the objection and, Mr. Erskine, you will submit a short memorandum with reference to that. At the conclusion of the whole case when you submit your memorandum, you can argue this [150] point.

Mr. Erskine: All right.

Mr. Lasky: Perhaps this goes to the legal argument which may turn this case one way or the other.

The Court: Yes.

Mr. Lasky: Will you answer the question, please?

Q. If you deduct the conditional credits which have been entered to the United Produce Company account on the basis of the checks referred to, you deduct that, did the United Produce account have any apparent credit on the books on November 15, 1948, or thereafter against which to pay the \$113,216.50?

Mr. Erskine: Just a second. It will be understood the objection goes to that question?

The Court: The objection goes. It is all admitted subject to your objection, and the Court reserves its ruling and you can argue the matter.

Mr. Erskine: All questions along this line.

The Court: Your record will be saved. This whole matter, anything that you contend is immaterial you may argue to me at any later time and I will recognize it as having come under your objections.

The Witness: The answer is "No."

(Testimony of Frederick C. Messenger.)

Q. (By Mr. Lasky): Did the United Produce Company on November 15th, 1948, and thereafter have any funds in the Merchandise National Bank out of which to pay the six checks for [151] \$113,216.50? A. No.

Q. What was the state of the United Produce's account with Merchandise National Bank on November 15th and thereafter?

A. Very much overdrawn.

Q. How much? I do not mean to exact dollars and cents, but what is the general magnitude of it? In excess of what?

A. In excess of a half million dollars.

Mr. Lasky: I think all other questions I intended to ask Mr. Messenger have been covered by stipulation; so I turn him over to you, Mr. Erskine, for cross-examination.

The Court: Shall we take the recess? The Court will take a recess until five minutes after three.

(Recess.) [152]

Cross-Examination

By Mr. Erskine:

Q. Mr. Messenger, prior to your conversation with Mr. Etribou, as I understood your direct testimony, you had learned that the Merchandise Bank was taking a loss in its transactions with the United Produce Company? A. Yes, I did.

Q. And then in the afternoon of November 17

(Testimony of Frederick C. Messenger.)

you called up the East Bakersfield branch of the Bank of America and talked to Mr. Etribou?

A. That is right.

Q. And then I understood you to say that you told Etribou that the United Produce Company had you over a barrel and perpetrated a fraud upon you—that is, your bank—and that you wanted to talk to him about the account of Lofendo with the East Bakersfield branch; that is correct, substantially, isn't it?

A. I wanted to talk to him about checks that had been drawn against the Lofendo account.

Q. Then you had a list of the checks that had been received by your bank and you started to read off that list to Mr. Etribou?

A. That is correct.

Q. And then he told you that he thought it would be better for him to read off the checks from the account of Lofendo at his bank that had been paid so that you could check off those checks against his list? A. That is correct.

Q. I think that you also testified that those checks that you [153] read off to Mr. Etribou, or rather the checks that you had on that list, were not checks that had been deposited to the credit of the United Produce Company in your bank but had been received by your discount department as the checks of debtors owing accounts receivable assigned to your bank? A. That is correct.

Q. And the checks that you had on your list are those included in Exhibit 11?

(Testimony of Frederick C. Messenger.)

A. That is right.

Q. Are those all the checks that were on your list?

A. I didn't foot up these particular checks to see whether or not they are all; I assume that they are.

Q. You assume that they are all of them?

Mr. Lasky: Pardon me. All that were on the list after he checked off the items that Mr. Etribou called off, is that what you refer to?

Mr. Erskine: Yes, all the unpaid checks. Are these all the unpaid checks?

Mr. Lasky: As I understand it, yes.

Q. (By Mr. Erskine): I understand on the back of these checks, Mr. Messenger, there is an endorsement, "Pay to the order of the Merchandise National Bank, United Produce Company"; it is a stamp endorsement. That was the regular endorsement of the United Produce Company?

A. I believe that stamp has "Special Account" on that endorsement. [154]

Q. "Special Account," yes.

A. That is the fact, yes.

Q. And all of the checks that the United Produce Company delivered to you with remittance sheets, that is checks of debtors owing the United Produce Company accounts receivable had a similar endorsement on them? A. That is right.

Q. Now Etribou read off to you the checks that his branch had paid against the Lofendo account commencing back on November 4?

(Testimony of Frederick C. Messenger.)

A. November 1.

Q. November 1.

Mr. Erskine: I believe it was stated this morning, Mr. Lasky, in our conversation in the Judge's chambers when we were discussing our stipulation, that the commercial ledger sheets of the Lofendo account could be received in evidence provided they went back some time beginning in September or October.

Mr. Lasky: Oh, yes, I have no objection. If you tell me that these do go back to that time, it is all right.

Mr. Erskine: I would like to have these marked, your Honor.

The Clerk: Defendant's Exhibit C for identification.

Mr. Erskine: I would like to offer it in evidence.

The Court: No objection?

Mr. Lasky: There is no objection.

The Court: It may be so admitted.

The Clerk: Defendant's Exhibit C in [155] evidence.

Q. (By Mr. Erskine): You say that Mr. Estribo went back to the first day of November in order to read off to you the checks which his branch had paid?

A. Mr. Etribou told me that he would read off all checks paid by the East Bakersfield branch from and including November 1 and on.

Q. Were those checks which he read off to you few in number or rather numerous?

(Testimony of Frederick C. Messenger.)

A. He called off a number of them; just how many I couldn't say.

Q. There were well in excess of 20 checks, that he called off?

A. There might have been, because there was a number of checks that he called off that were not on my list.

Q. And your best recollection is that there might have been as many as 20 checks that he called off as checks that his bank had paid, that is, Lofendo checks drawn on his bank since November 1; is that right? A. I couldn't say, Mr. Erskine.

Q. But your present recollection is that they were numerous?

A. There were quite a number of checks called off.

Q. When Mr. Etribou was calling off those checks to you he told you that he had the account of Lofendo with the branch before him and that he was reading what he was calling off to you from the account, didn't he?

A. He told me that he had the record of the Lofendo account before him and he was reading from that. [156]

Q. Did he tell you at that time that he was not, or rather, did he read to you not only the debits to the account but the credits?

A. He read off the debits.

Q. And there was no reference to any credits to Lofendo in what Mr. Etribou told you in that conversation?

(Testimony of Frederick C. Messenger.)

A. There was no reference to credits and amounts of credits that he made during that conversation.

Q. But he did tell you that as of the close of business on November 17 there was a balance to the credit of Lofendo of \$699?

A. He volunteered that information.

Q. He told you that? A. Yes.

Q. And he also told you that his branch had been paying only against collected funds?

A. He made the statement that "We have not been paying against uncollected funds for some time."

Q. And he told you that his branch was in the clear? A. Yes, he did.

Q. And when he said that to you, you understood him to mean, did you not, Mr. Messenger, that all the debits that had been entered against the account were entered against collected funds?

A. There was no discussion of that whatsoever.

Q. I am asking you what you understood him to mean when he told you that his branch was in the clear? [157] A. He meant—

Q. Is that what you understood him to mean?

A. That at that particular time he had not paid against uncollected funds and that they had that balance remaining, that was a black balance.

Q. And he told you that the branch was in the clear, did he not? A. Yes, he did.

Q. I am asking you, Mr. Messenger, if you un-

(Testimony of Frederick C. Messenger.)

derstood him to mean by that statement that the branch had been debiting checks against collect funds?

A. That was not discussed; there was no statement about it at that particular time.

Q. I'm not asking you whether or not he told you what he meant by that expression; I am asking you what you understood by the expression. Did you understand that?

A. You mean that he had been paying only against collected funds?

Q. And that therefore his branch was in the clear. That is what you understood, wasn't it?

A. You could assume from his conversation that he was paying—for some time they had been paying only against collected funds.

Q. Now I haven't got an answer to my question yet, Mr. Messenger, and I believe it is material. Mr. Etribou told you in that conversation that he had been paying against collected funds; that his branch had been paying against collected funds, and that the branch was in the clear, and I am asking you what you [158] understood by that expression of Mr. Etribou's, that the branch was in the clear? What did you understand by that, Mr. Messenger?

A. By that I understood that for some time they had not been paying against uncollected funds, and at that particular moment they were in the clear, they had a black balance of \$699.02.

Q. Now in that conversation you asked Mr. Etribou whether he had received an advice of

(Testimony of Frederick C. Messenger.)

credit to the effect that the six checks which are the subject of this litigation had been paid? You asked him that, did you not?

A. I asked him whether he had received—his branch had received the advice of credit.

Q. To the effect that these six checks had been paid? A. That is correct.

Mr. Lasky: Pardon me; is that asking what was said or an interpretation of the meaning of the advice of credit letter?

Mr. Erskine: I am asking him what was said.

A. I asked Mr. Etribou whether or not his branch had received the advice of credit from Merchandise National Bank on their collection of six checks for 113,000 odd dollars.

Mr. Lasky: I move to strike that other statement that dangled at the end of a question about the advice of credit stating that something had been paid.

Mr. Erskine: That may go out.

The Court: Very well; it may be stricken. [159]

Q. (By Mr. Erskine): When you referred to an advice of credit, you referred to this document which has already been introduced in evidence as defendant's exhibit A, did you not?

A. That is correct.

Q. And you asked Mr. Etribou if he received that advice? A. That is correct.

Q. And he replied that he had not?

A. That is right.

Q. Now did I understand you to say, Mr.

(Testimony of Frederick C. Messenger.)

Messenger, that at that time you told Mr. Etribou that the advice of credit had been sent out in error?

A. I did.

Q. Did you explain to him that had been sent out in error because your bank had received checks in its assigned accounts receivable account which had turned out to be not good checks and would therefore have to be charged back? Did you tell him that? A. There was no such discussion.

Q. All that you told him in that connection was that your bank had sent out the advice of credit in error? A. That is right.

Q. And you didn't explain to him in what the error consisted?

A. The only explanation was that the United Produce Company had perpetrated a fraud on the Merchandise National Bank and that the advice of credit had been sent out in error. [160]

Q. Did you tell him that the advice of credit had been sent out in error because the United Produce Company had perpetrated a fraud on the bank?

A. No, sir, I didn't state it that way.

Q. As a matter of fact, the way the conversation took place was that you started the conversation with the statement that the United Produce Company had perpetrated a fraud on the bank; that is right, is it not? A. That is right.

Q. And then you discussed the checks that had been paid and those that had not been paid; that is right, is it not?

(Testimony of Frederick C. Messenger.)

A. I believe that was the order.

Q. And then you came along and you told him that the advice of credit had been sent out in error?

A. That is right.

Q. And you didn't give him any explanation with respect to that particular statement, did you?

A. No, sir.

Q. Now prior to your discussion with Mr. Etribou you knew, did you not, that the six checks had been received at your bank on November 15?

A. Yes, sir.

Q. And you knew that the six checks had been debited—that is, you knew prior to your conversation with Mr. Etribou that the six checks had been debited against the account of United [161] Produce Company? A. Yes.

Q. And you knew prior to that time that the account between the Bank of America and the Merchandise Bank kept by the Merchandise Bank had been credited with the amount of the six checks? A. On our books, yes, sir.

Q. Yes, on your books. And you knew that the six checks had been stamped "Paid" and had been filed with the cancelled checks of the United Produce Company? A. Yes.

Q. And you knew all that prior to your conversation with Mr. Etribou, didn't you?

A. Yes.

Q. And you knew, of course, in addition to that, that the advice of credit had been sent out on November 15? A. Yes.

(Testimony of Frederick C. Messenger.)

Q. Now I believe you stated that Mr. Etribou said that he would do what he could to help you out, the Merchandise Bank, and that he would either enter the credit and charge checks against it, or that he would not make entry of it, is that right?

A. That is correct.

Q. And did Mr. Etribou at that time say to you that he couldn't refuse to enter that credit?

A. He did not, sir.

Q. He didn't say anything along that line? [162]

A. No, sir, he did not.

Q. But at that time, at the time you had your conversation with Mr. Etribou, you knew that the six checks had been debited against the account and that the Bank of America had been credited with the amount of the six checks; that is right, isn't it?

A. Yes.

Q. And you have testified to your experience as a banker here in answer to questions put to you by Mr. Lasky. You have testified, haven't you?

A. What testimony?

Q. You have testified with respect—

Mr. Lasky: The record will speak for itself as to what he testified to.

Q. (By Mr. Erskine): Let me withdraw that question and put it this way: You have had long experience as a banker, have you not, Mr. Messenger? A. Yes, sir.

Q. Now when you were discussing this matter with Mr. Etribou of whether or not the Bank of America was to enter the credit, was there any

(Testimony of Frederick C. Messenger.)

doubt in your mind with respect to the right of the Bank of America to refuse to enter that credit?

A. No, sir.

Q. You believed clearly and definitely at that time, upon your own experience as a banker, that the Bank of America at that [163] particular point, on November 17, did have the right to refuse to enter that credit, did you? A. Yes, sir.

Q. On what did you base that belief, Mr. Messenger?

Mr. Lasky: If the Court please, he has asked for the man's understanding. Now he wants him to give his opinion why he so believed it. That almost calls for a legal argument.

The Court: No, I think he has given his opinion; now he is asking him to explain upon what his opinion is based. There has been no objection to the opinion given. Now of course he is entitled to know upon what he bases that opinion.

Mr. Lasky: I will withdraw my objection.

A. The Bank of America had not yet received the advice of credit, had not acted upon the advice of credit.

Q. (By Mr. Erskine): Those were the grounds upon which you based your opinion that the Bank of America did have the right at that juncture, on November 17, to refuse to enter the credit; is that right? A. Yes, sir.

Q. Now, Mr. Messenger, when did you first discuss that legal principle that the Bank of America had the right to rescind the credit because it had

(Testimony of Frederick C. Messenger.)

not acted upon it? When did you first discuss that legal principle with anyone? Did you discuss it before or after your conversation with Etribou?

Mr. Lasky: Now I object to that as being utterly immaterial, [164] whether he ever discussed it or when he discussed it.

The Court: Yes, I don't see, counsel—in other words, this witness' opinion as to what the legal rights of one party or the other was under the circumstances is not binding on anyone. It is a matter that the Court is going to have to determine, as to whether or not—

Mr. Erskine: I believe, your Honor, that it is proper cross-examination. We believe that it is proper cross-examination for this reason: This man says that he has been a banker of long experience; he believed that the Bank of America had the right on November 17, after the checks had been debited to the account of the United and after the Bank of America had been credited, after these other events had taken place, that they had a right to rescind the credit.

The Court: What difference does it make whether he believed it or did not believe so far as this Court is concerned? I am going to have to decide that problem.

Mr. Erskine: Yes; but if, as a matter of fact, he did not believe that, if he believed, upon the basis of his experience as a banker, that when the checks had been debited to the United Produce account and the Bank of America account had been credited, that

(Testimony of Frederick C. Messenger.)

then a relationship of debtor and creditor was created between the Merchandise Bank and the Bank of America and a relationship of debtor and creditor had been created between the Bank of America and Lofendo—if he believed that [165] at that time, then it certainly casts doubt upon his story that Etribou told him, “All right, we will rescind the credit.” That is the purpose of the examination.

The Court: Very well; you may proceed upon that basis. You will be permitted to examine for that purpose.

Mr. Erskine: That is the purpose.

Mr. Lasky: Now what is the last question?

Mr. Erskine: I will withdraw the last question.

Q. When did you first discuss this legal principle, Mr. Messenger, with anyone?

Mr. Lasky: Without repeating it, my objection goes to this line of questioning?

The Court: Yes.

Mr. Erskine: That the Bank of America had the right to revoke this credit because it had not acted upon it. When did you first discuss that, Mr. Messenger?

A. There wasn't any question of a discussion of the Bank of America revoking the credit. We were rescinding the credit and asking the Bank of America not to act upon it, when they received it to return it to one of our officers when he arrived the following day.

Q. When did you first discuss the legal principle

(Testimony of Frederick C. Messenger.)

with anybody that as the advice of credit had not been received, you had a right to rescind the credit and the Bank of America had the right to agree that the credit should be rescinded? When did [166] you first discuss that legal principle with anybody?

Mr. Lasky: If he did discuss it. The question assumes something not established that he did discuss it.

The Court: Yes.

A. I should say prior to the conversation with Mr. Etribou that matter was discussed.

Q. (By Mr. Erskine): With whom?

A. Mr. Riordan, our general counsel.

Q. That very point was discussed, was it?

A. Yes, sir.

Q. And Mr. Riordan gave you his opinion that the advice of credit could be revoked by your bank because it had not arrived at the East Bakersfield branch, is that right?

A. The opinion was that if—as I recall it, if the advice of credit had not been received by the Bank of America, we would rescind our credit.

Q. That is what Riordan told you: If the advice of credit had not been received by the Bank of America you could rescind the advice, is that right?

A. That is correct.

Q. Did you know when you called up Mr. Etribou whether or not that advice had been received by the Bank of America?

A. No, sir, I did not.

(Testimony of Frederick C. Messenger.)

Q. As a matter of fact, it had been mailed on November 15, hadn't it? [167]

A. That is right.

Q. It had been mailed according to your belief not knowledge—according to your belief it had been mailed to the East Bakersfield branch; that is right, isn't it? A. I believe so.

Q. And that is why you asked Mr. Etribou whether or not he had received it, because you thought it had been mailed there?

A. That is right.

Q. The conversation between you and Mr. Etribou took place rather late in the afternoon of November 17, didn't it?

A. 4:17 Chicago time was the starting of the conversation.

Q. What is your experience, Mr. Messenger, with respect to the mails from Chicago to a place like East Bakersfield?

Mr. Lasky: Well now——

Q. (By Mr. Erskine): In your experience would an advice of credit mailed on November 15 be received at the East Bakersfield branch on the second succeeding day after it was mailed?

Mr. Lasky: Now I object to that; what his belief was about the course of mails is immaterial. He said he didn't know whether the advice was received, he telephoned to find out, and if he learned something he would act accordingly.

The Court: The objection is sustained.

Q. (By Mr. Erskine): Now as I understood

(Testimony of Frederick C. Messenger.)

you, Mr. Messenger, you told Mr. Etribou that Mr. LeRoy was taking the plane that night for California? [168] A. That is correct.

Q. And that he was going down to Bakersfield?

A. That is right.

Q. I believe you stated that Mr. Etribou said that he would go out to the airport and meet Mr. LeRoy? A. That is right. [168A]

Q. Now, isn't it a fact, Mr. Messenger, that what Mr. Etribou told you was that he could not refuse to enter the credit but that if you gave to Mr. LeRoy checks drawn by Lofendo against the account, he would do what he could to give the Merchandise Bank priority in charging those checks against the credit?

A. There was no such conversation whatsoever.

Q. I believe, however, that you testified that Mr. Etribou said that he would either enter the credit and charge checks against it or not enter the credit, as you wanted it?

A. He did say that at the very beginning.

Q. But he did not say to you, according to your testimony, what I am stating?

A. No, he did not.

Q. That is, that he could not refuse to enter the credit, but that if you sent out with Mr. LeRoy checks of Lofendo drawn against the account, he would do what he could to give the Merchandise Bank preference in charging those checks against the credit? A. No.

Q. He did not say that?

(Testimony of Frederick C. Messenger.)

A. Mr. Etribou did not.

Q. Isn't it a fact that Mr. Etribou told you that he would do everything possible to help you out in your problem, and that he would discuss the matter with LeRoy when LeRoy alighted in Bakersfield. [169] A. He did not.

Mr. Erskine: Let me have that statement, will you?

Mr. Lasky: What statement?

The Court: The memorandum?

Mr. Lasky: It has been marked for identification.

The Court: It has been marked for identification but not introduced.

Q. (By Mr. Erskine): Mr. Messenger, you have just stated that Mr. Etribou did not tell you that he would do everything possible to help you out in your problem, and would be glad to discuss the matter with Mr. LeRoy when he arrived, but I will call your attention, Mr. Messenger, to your memorandum, the second page of it, which reads as follows:

“Mr. Etribou stated that he would do everything possible to help us in our problem and would be glad to discuss the matter with Mr. LeRoy when he arrived.”

A. I do not understand you said it just exactly that way.

Q. Let us read it. Your answer was pretty definite and clear. Read what he said.

(Testimony of Frederick C. Messenger.)

(The reporter read as follows.)

"Q. Isn't it a fact that Mr. Etribou told you that he would do everything possible to help you out in your problem and that he would discuss the matter with LeRoy when LeRoy arrived in Bakersfield?

"A. He did not." [170]

Q. (By Mr. Erskine): Wherein does that statement of mine differ from your memoranda, which reads,

"Mr. Etribou said he would do everything possible to help us in our problem and would be glad to discuss the matter with LeRoy when he arrived."

Wherein is the difference?

A. That does not differ.

Mr. Lasky: I request that he see both sheets of that memorandum.

Mr. Erskine: You can show him both sheets later.

The Court: It is not necessary; counsel is cross-examining him, and if he wants to show him any particular part he may do so.

Mr. Lasky: Very well.

Q. (By Mr. Erskine): And so your statement that Etribou did not tell you that is incorrect?

A. My answer to your previous statement is incorrect, yes.

Q. Mr. Messenger, had you ever talked with Mr. Etribou on any occasion prior to this occasion on November 17th? A. No, I had not.

(Testimony of Frederick C. Messenger.)

Q. Did you ever know Mr. Etribou prior to that time? A. No, I did not.

Q. Did you ever have any contact with the East Bakersfield branch of the Bank of America prior to that time?

A. Not that I could recall. [171]

Q. And you had had no transactions of any sort with that branch of the Bank of America prior to that time? A. Personally I had not.

Q. Had you personally ever had any transactions with the Bank of America at any branch, at any office, prior to that time?

A. Yes, I have had.

Q. But you had had none with Etribou or the East Bakersfield branch?

A. Not that I recall.

Q. Prior to your conversation with Mr. Etribou did you have a conversation with Mr. LeRoy in which Mr. LeRoy was asked whether or not he would go out to California in connection with this matter, and in which Mr. LeRoy stated that he was willing to go? A. Yes, I did have.

Q. As a matter of fact, when you were talking with Etribou Mr. LeRoy was sitting by your side at the telephone, was he not?

A. He was, yes.

Q. Is it a correct statement, Mr. Messenger, to say that after your conversation with Mr. Etribou you had another talk with Mr. LeRoy, in which you suggested to Mr. LeRoy that when he got out to California he try to pick up the advice of credit?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: Just a moment. I do not believe this is proper cross-examination with respect to conversations with LeRoy. The witness has testified to the one with Mr. Etribou. [172]

The Court: It does not seem to be within the direct examination.

Mr. Erskine: The purpose will be disclosed directly, your Honor. I think it is proper cross-examination and it is preliminary in nature.

The Court: What is the purpose?

Mr. Erskine: I would rather not disclose it, your Honor please. I was just coming to the purpose.

The Court: I will reserve ruling on the objection. Proceed.

(Question read.)

A. In discussions with Mr. LeRoy after the Etribou conversation, one of the instructions that was given to him was to pick up the advice of credit.

Q. And your understanding in the afternoon of November 17th, after your telephone conversation with Mr. Etribou, was that Mr. LeRoy, when he got out to California, was to pick up the advice of credit, was that right.

Mr. Lasky: I object to that because it is not proper cross-examination, and this preliminary questioning seems to be leading to nowhere.

The Court: I will reserve ruling on the matter. Answer the question.

(Question read.)

(Testimony of Frederick C. Messenger.)

A. Yes.

Q. (By Mr. Erskine): Mr. Messenger, I will ask you this: [173] What was your understanding and state of mind on the afternoon of November 17th, as to whether or not the Bank of America would surrender the advice of credit to you without first having received the six checks which were then in your possession?

Mr. Lasky. If your Honor please, I object to the man's understanding or state of mind as irrelevant. The conversation occurred and the Court will have to decide whether from that conversation the Bank of America should or should not have done so. What the witness believed they should do would be immaterial.

The Court: That is my view of the matter, counsel.

Mr. Erskine: I think if your Honor please, the understanding of this witness with respect to that point is most material. He has testified that he rescinded the credit, and that Etribou said, "All right, I will rescind the credit." He has testified just now that LeRoy was told to pick up the advice of credit. Now, it is very material to find out whether or not, in my opinion, testing the credibility of his story, to find out whether or not LeRoy took with him, that is, with LeRoy when he went to California, the six checks for the purpose of getting the advice of credit.

Mr. Lasky: We have stipulated—

Mr. Erskine: Wait a minute. This is cross-

(Testimony of Frederick C. Messenger.)

examination. If this witness had an understanding, if it was his state of [174] mind on November 17th that the Bank of America, according to the practice of banks, would not surrender the advice of credit unless it got the six checks, which after all were the checks of its deposit—if that was the state of mind, and he did not give the six checks to LeRoy to take with him to California, it in my opinion casts doubt upon his testimony.

Mr. Lasky: I would like to reply to that. We agreed to stipulate this morning that the six checks were mailed back on the 19th directly to the East Bakersfield branch. Now, if there is some kind of practice whereby one bank will not give up an advice of credit without the checks being sent back, and if he wants to offer evidence on that, that is another thing. But to ask the witness for his understanding is immaterial.

The Court: Yes, I do not understand it, counsel. The facts are there, and the Court can then test the credibility of the witness from the admitted facts and the facts that did take place. Now, as to what his own individual opinion on the matter or state of mind was, I can't follow your attack. I will sustain the objection at this time.

Q. (By Mr. Erskine): Mr. Messenger, those six checks were in the hands of the bank on the afternoon of November 17th, were they not?

A. In the hands of the Merchandise National Bank, yes.

(Testimony of Frederick C. Messenger.)

Q. Did you deliver them to Mr. LeRoy before Mr. LeRoy left for California? [175]

A. No, I did not.

Q. As a matter of fact, you did not send those six checks out to California until you wrote your letter of November 20th, I believe it is?

I would like to have this letter marked for identification.

(The letter referred to was thereupon marked Defendant's Exhibit D.)

Mr. Lasky: We stipulated this morning that letter can go in, so if you want to offer it—

Mr. Erskine: Yes, I would like to offer it in evidence.

The Court: Very well; it may be admitted.

(Defendant's Exhibit D for identification was thereupon received in evidence.)

Q. (By Mr. Erskine): Referring you to your letter of November 19th, Mr. Messenger, which has just been introduced in evidence, that letter returned the six checks to the Bank of America, did it not? A. Yes, sir, it did.

Q. This letter states,

"The return of these checks was agreed upon by your head office in San Francisco, with Mr. A. L. LeRoy, our vice president, on Thursday, November 18, 1948, thereby cancelling our advice of payment which had been forwarded to you in error."

That is correct, is it not? [176]

(Testimony of Frederick C. Messenger.)

A. Yes, sir.

Q. This letter bears your signature, does it not?

A. Yes, sir.

Q. You did not refer in this letter to your conversation with Mr. Etribou, did you?

A. I don't remember.

Mr. Lasky: The letter will speak for itself.

Mr. Erskine: I am asking the witness. This is cross-examination.

The Witness: No, sir, I did not.

Q. (By Mr. Erskine): Evidently when you wrote this letter you believed, did you not, Mr. Messenger, that if the advice of credit had been rescinded, the six checks should be returned to the Bank of America? A. Yes, sir.

Q. With respect to your memorandum that has been marked for identification in this case—it has not been admitted in evidence—marked for identification as Plaintiff's Exhibits 3-A and 3-B, you dictated that shortly after your conversation with Mr. Etribou, did you not? A. Yes, sir.

Q. Is the answer "Yes"? A. Yes.

Q. And it was transcribed immediately?

A. Yes, sir. [177]

Q. And you had it in your hands completely transcribed by what hour in the afternoon, according to your best recollection? A. Maybe 5:30.

Q. And you saw Mr. LeRoy after that hour, did you not? A. I did.

Q. You had several talks with Mr. LeRoy after that hour? A. I did.

(Testimony of Frederick C. Messenger.)

Q. Did you deliver a copy of that memorandum to Mr. LeRoy so he could take it with him to California? A. No, I did not.

Mr. Erskine: I am reaching another subject. It will take me a little while. I guess I had better keep going.

The Court: I think you had better keep going for a while.

Mr. Erskine: Time is of the essence.

Q. Mr. Messenger, you had a telephone conversation with Mr. LeRoy when Mr. LeRoy was in San Francisco on November 18th, did you not?

A. I did.

Mr. Lasky: Not proper cross-examination, outside the scope of the direct.

Mr. Erskine: I think that that might be proper examination. I do not know whether that is correct or not. You see, your Honor, the witness has stated that Etribou did not refer to any of the credits in this account on the Lofendo account, and it is our position in this matter that on November 15th the East [178] Bakersfield branch gave him immediate credit for the \$97,000 in checks. Those checks were rejected by the Merchandise Bank at 1:30 p.m. Chicago time on November 18th. Later that afternoon, I might say, the checks were rejected by the witness. The witness gave the instructions that the checks be rejected; that on that afternoon LeRoy, from Duncan's office where they had been discussing the revocation of the credit, and where LeRoy, according to our contention, was telling Duncan and

(Testimony of Frederick C. Messenger.)

Johnson that the advice of credit was sent out by error, and where they had communicated with Etribou and Etribou had told them that they were in the clear, that his branch was in the clear, that we will show or attempt to show that this witness had this conversation with LeRoy after he had rejected the \$97,000 in checks, and that he did not communicate that fact to LeRoy, so that LeRoy could communicate it to the men in the Bank of America with whom he was dealing, and that that in our opinion is not dealing in a proper way.

The Court: It may be admissible later under your theory, but it is not proper cross-examination at this point. The objection is sustained.

Mr. Erskine: Then I come to this situation: I do not know, your Honor, how long these gentlemen want to remain in San Francisco.

Mr. Lasky: Until the end of the trial.

The Court: This is a lovely city. There is not reason [179] why they shouldn't enjoy the benefits of San Francisco.

Mr. Erskine: I want the opportunity, and I so advise the Court, at some stage of the proceeding to recall this witness to cross-examine him on Rule 43(b).

Mr. Lasky: He will be present at all times subject to your call and the direction of the Court.

Mr. Erskine: And the same goes for Mr. LeRoy. I want him here all the time.

Mr. Lasky: The same understanding with respect to the men whom you control.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: You can have them here whenever you want. I have been looking over my notes. I think this is proper cross-examination, but I hesitate to reveal the reason for my thought because I do not want to disclose it to the witness.

The Court: It does not immediately appear to me to be proper cross-examination and so I have sustained the objection, but you are not going to be prejudiced by it because you can call the party under Rule 43(b), at any event, at a later point in putting on your defense.

Mr. Erskine: Now, where are the six checks? Have they been introduced in evidence?

Mr. Lasky: I do not think they have been introduced.

The Court: We will mark them in evidence.

Mr. Lasky: Under this procedure they are getting defendant's numbers instead of [180] plaintiff's.

Mr. Lasky: So far as I can see that does not create any prejudice.

The Court: I think they may go in as a group.

Mr. Erskine: I think so, yes.

(The checks referred to were thereupon received in evidence and marked Defendant's Exhibit E.)

Q. (By Mr. Erskine): Calling your attention to these six checks that have been marked as a group "Defendant's Exhibit E," I will ask you, Mr. Messenger, if that is your signature on the back of each one of these checks?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: I will stipulate to that.

A. Yes, it is.

Q. (By Mr. Erskine): Did you cause that notation to be made above your signature? "Cancelled in error"? A. I did.

Mr. Erskine: It is perfectly proper that this go in, but I do make the representation to the Court we are now taking time up on the examination of the witness concerning things that we are stipulating to.

The Court: I think so. I think that is all stipulated to.

Mr. Erskine: It is just preliminary, your Honor.

Q. Now, isn't it a fact, Mr. Messenger, the reason you marked those six checks in that way was that, by reason of your agreement with Etribou, the checks were not going to be paid, [181] and so the only way to eliminate them was to state that they had been cancelled in error?

A. The six checks, the credit—

Q. Just a second; I would like to have you answer that question yes or no. Is that or is it not correct? Then you can explain your answer.

Mr. Lasky: May I make the objection that the question is ambiguous?

The Court: It may be to you. I do not know that it is to the witness.

Mr. Lasky: What is he referring to in the expression "to eliminate them"?

Mr. Erskine: The checks.

The Court: Do you understand the question?

A. Not now.

(Testimony of Frederick C. Messenger.)

(Question read.)

A. I couldn't answer that question.

Q. (By Mr. Erskine): What is that?

A. I couldn't answer that question the way it is put there. [182]

Mr. Lasky: What page?

Mr. Erskine: Page 231.

Mr. Lasky: Can you wait until I get my copy, if you don't mind?

Mr. Erskine: Look at this while I read.

Q. I will ask you if you didn't give the following testimony when your deposition was taken in Chicago in December of last year:

“Q. What was your reason, Mr. Messenger, for your placing on Defendant's Exhibits 3A to 3F, both inclusive, for identification”——

It will be stipulated, I take it, that those were the six checks?

Mr. Lasky: The six checks.

Mr. Erskine (Reading):

“The endorsement: ‘cancelled in error, F. C. Messenger, Merchandise National Bank’?

“A. The reason they were marked ‘cancelled in error’ was the fact that by agreement with Mr. Etribou the checks were not going to be paid and the entry would not be entered on those checks, so that the only way you can eliminate a cancellation is by indicating on them ‘cancelled in error.’ ”

(Testimony of Frederick C. Messenger.)

Did you give that testimony? A. Yes, I did.

Q. Was that the reason why you made that entry "cancelled in error"? [183]

A. The "cancelled in error" was to eliminate the perforation that appeared through the check.

Q. And you have stated here the reason that they were marked "cancelled in error" was the fact that "by agreement with Mr. Etribou the checks were not going to be paid." Was that the reason?

A. Yes.

Q. Then your reason for marking them "cancelled in error" was not that they had been charged against fictitious credits; is that right, or is that another reason?

A. The checks had been entered on this particular account, the United Produce account. They were not being paid, and the memorandum of "cancelled in error" was put on the back to cancel the record of a charge against the account.

Q. And the reason for that, that they were marked that way, or to put it in your own words: "The reason they were marked 'cancelled in error' was the fact that by agreement with Mr. Etribou the checks were not going to be paid"; is that correct?

A. That is right.

Q. I believe you have already testified, Mr. Messenger, that the checks Plaintiff's Exhibit No. 4 for identification, the Lofendo checks, were received as payments on account of assigned accounts receivable?

A. They were received from the United Produce

(Testimony of Frederick C. Messenger.)

Company in purported payments of accounts of debtors to the United Produce [184] Company.

Q. And I think that you have stated that your bank had four ledgers showing its transactions with the United Produce Company—a commercial account ledger, a drafts discounted ledger, a notes discounted ledger, an assigned accounts ledger; that is correct, is it? A. That is correct.

Q. Your bank was discounting drafts in large sums of money for the United Produce Company immediately prior to November 17, was it not?

Mr. Lasky: I object to that as immaterial.

The Court: Overruled.

Mr. Erskine: Would you answer that question?

A. I thought there was an objection.

Mr. Lasky: The Court ruled.

The Court: I ruled you may answer the question.

A. Oh, I beg your pardon. Yes, the bank was discounting drafts for the United Produce Company.

Q. (By Mr. Erskine): On the average the drafts discounted per day exceeded \$200,000, did they not? A. No, sir.

Mr. Lasky: I made the objection very cursorily that it was immaterial. I make it again because I don't see, No. 1, that it has anything to do certainly with the direct examination, and, if it is leading off into the subject of some of the defenses [185] in the case, then it ought to come out as part of the defense and we will meet it at that time.

The Court: What is the purpose of this?

(Testimony of Frederick C. Messenger.)

Mr. Erskine: The purpose relates to his testimony that there was only one account with the bank.

The Court: That is what I understood it to be. On that theory, of course it is proper cross-examination.

Mr. Lasky: Yes, but the amount of drafts discounted, whether they were large or small, would hardly be material to that.

The Court: Oh, it might have some bearing as to whether or not it would be carried as a separate account or just part of the general account, or whatever the system is.

Mr. Lasky: So long as the purpose of the examination now is directed to the testimony about four ledgers, I withdraw my objection.

The Court: Very well.

Mr. Erskine: Would you answer that question, Mr. Messenger?

A. I didn't exactly understand your question. I would like to have that question restated.

(Question read by the Reporter.)

A. No, that was not correct.

Q. What did they average per day?

A. The average drafts discounted per day varied from a few thousand dollars up to maybe ten or fifteen thousand dollars. [186]

Q. I don't mean that; we didn't understand one another. I mean what on the average were the outstanding drafts every day?

A. The average outstanding was different. That

(Testimony of Frederick C. Messenger.)

ran in varying amounts; it might have been \$150,000; it might have been \$250,000. I don't remember the amounts.

Q. And then you had the assigned accounts receivable ledger, did you?

A. That is correct.

Q. And that assigned accounts receivable ledger referred to the ledger showing payments on account of assigned accounts receivable?

A. That is right.

Q. And in addition to that you had a notes discounted ledger, is that right?

A. That is right.

Q. And that notes discounted ledger showed loans made from time to time by the bank to the United Produce Company?

A. That is correct.

Q. And payments received on account of such loans?

A. The actual payments of the notes, yes, sir.

Q. The payments received on account of assigned accounts receivable would be recorded in the assigned accounts receivable ledger?

A. That is right.

Q. Not in the notes ledger? [187]

A. That is right.

Q. Did you, or to your knowledge did any officer of the Merchandise Bank, at any time prior to November 17, in order to determine the amount of the credit balance of the United Produce Company in the commercial account, consult the drafts dis-

(Testimony of Frederick C. Messenger.)

counted ledger or any of the other ledgers to which I have referred?

A. I personally did not. I have—

Q. Was it the practice of your bank prior to November 17, when considering the amount of the credit balance to the credit of any customer on the commercial ledger of that customer to consult not only the commercial ledger sheet but also the other ledgers to which I have referred, in the event such customer was carrying on substantially the same sort of business with the bank as the United Produce Company?

Mr. Lasky: That involves the assumption that other customers were carrying accounts like this.

The Court: He just asked what the practice was if there were such transactions, if the bank had a custom in this regard.

Mr. Lasky: Very well.

A. The bank had a practice on accounts where there were borrowing customers, the borrowing customers had a commercial account, that transactions on its commercial account were referred to the officer handling that particular loan account, and that officer handling that loan account should have knowledge of the transactions that take place in those ledgers that are being [188] talked about.

Q. Certainly, that is obvious. You say, Mr. Messenger, that the loaning officer in charge of an account such as this should consider not only the commercial ledger sheet of the account but the other ledgers? A. That is right.

(Testimony of Frederick C. Messenger.)

Q. To which you have referred?

A. That is right.

Q. Is that right? A. That is right.

Q. And he should keep in constant touch with those, should he not? A. Yes, sir.

Q. And he should determine, among other things, how payments were being received, for example, from debtors on account of accounts receivable, is that right?

A. I was not a loaning officer there, and I didn't handle any of those transactions.

Q. But you have been a banking officer for a long while, Mr. Messenger, and you are familiar with banking practice, and it is a fact, is it not, that a loaning officer would keep in touch with the entire account? A. He should.

Q. Or the entire accounts, let us say, in order to uphold my theory? A. They should. [189]

Q. Of the customer; that is right, isn't it?

A. They should.

Q. And among other things, they should observe whether or not the customer is discounting drafts drawn on the same drawee in very large sums of money, is that right? A. That is right.

Q. In other words, the loaning officer would determine whether or not there is any concentration in the drafts of any one drawee; is that correct?

A. That is why the——

Q. I am not asking any reason; I am asking you if that is right?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: Just a moment. I think that the examination has gone beyond the scope of the direct, as to the relationship between the several ledgers and may be getting into one of the defenses.

The Court: I think it is directed to determine whether or not there was one account involved here or more than one.

Mr. Erskine: That is right.

The Court: That is the purpose of the cross-examination.

Mr. Erskine: Well, I have got to be candid; perhaps I have gone a little bit further.

The Court: Of course, you necessarily get into facts concerning the defense; you can't draw a line and say one thing is on one side of it and one is on the other. If the purpose is to question the witness with reference to whether or not one [190] account existed or more than one account, of course that is right and proper cross-examination.

Mr. Erskine: Yes, that is the purpose, but then—

The Court: It may incidentally prove other things.

Mr. Erskine: To be candid, it very probably will.

The Court: The fact that it necessarily may prove other things doesn't make it not proper cross-examination.

Mr. Erskine: Would you read that last question?

(Testimony of Frederick C. Messenger.)

(The Reporter read the last question as follows: "In other words, the loaning officer would determine whether or not there was any concentration in the drafts of any one drawee, is that correct?"

A. They should.

Q. (By Mr. Erskine): And they should determine whether there is any concentration in the assignment of accounts receivable of any one debtor?

A. They should.

Q. And whether or not there is any concentration in the receipt of payments from any one debtor? A. They should.

Q. Now the question that I put to you a while ago was this—and I did not, as far as I know, get a response to it—when a loaning officer, according to the usual practice, usual and ordinary practice of your bank, was determining the credit balance to the credit of a customer against which he could draw [191] checks on his account, was it the practice of the loaning officer or any other officer of your bank to consult any other records than the commercial ledger sheet? A. Yes, they did.

Q. In order to determine the amount of credit balance to the credit of a customer against which he could draw checks? A. Yes.

Q. Now give me an instance when that was done, Mr. Messenger.

A. The officers, on numerous occasions, when the bookkeeping department would present to them

(Testimony of Frederick C. Messenger.)

the work of a day of a particular account, the checks that were being presented for payment that day, the deposit tickets covering deposits, if any, that were made that day,—on more than one occasion have referred to the ledger to ascertain the entire picture of the account before they have made a decision as to what should be done with that account on that day.

Q. As to whether or not checks should be paid against the account? A. Yes, sir.

Q. Now, Mr. Messenger, it is a fact, is it not, that there were in this United Produce account on many occasions prior to November 17th, what is known in the banking world as noonday red balances?

Mr. Lasky: Now, if your Honor please, we are getting outside the field— [192]

Mr. Erskine: No, we are not.

The Court: No, I think it is still going to the same point, and for that purpose it is proper cross-examination. If it incidentally establishes other matters, counsel, that doesn't make it not proper cross-examination.

Mr. Lasky: No; of course I understand that, but it would just seem to me that when we get into the noonday overdrafts, from my remembrance of what he was doing in the deposition, he was getting into one of the defenses. When the time comes I want to make an argument about the relevance of them.

The Court: You may argue its relevance, of course; but if I understand the picture, it is simply

(Testimony of Frederick C. Messenger.)

this: What counsel is trying to develop is that when a man has an account on the bank and draws checks on it, there is a balance due on that account on which he can draw. If you have a loan with the bank at the same time and you owe the bank a thousand dollars and you have \$200 in the checking account, you can draw a check for \$200, but you still owe the bank a thousand dollars on your loan. Is that the point?

Mr. Erskine: That is it.

The Court: And on that basis, a noonday balance might show that you owed the bank \$2,000, but you would have in your checking account a balance of \$1,000 upon which you could draw.

Mr. Lasky: No, because the noonday balances he is talking about are in the checking [193] account.

The Court: That may be, but he can examine along that line.

Mr. Lasky: I think he has got a right to go into whether there is one account or more than one.

The Court: Yes, that is the whole situation.

I think probably, however, we have arrived at a stage of the proceedings where you have to get back to your offices downtown and check out for the week end, or check in to do some work on this case for the week end. It might be that we had better recess at this time.

If you can get me just a case or two with reference to all of your theories that I can check, it

(Testimony of Frederick C. Messenger.) might help me a lot as we go along in the next few days.

Mr. Lasky: Yes, we will get it in the first of the week. I assume that your Honor wants just the citations without an analysis.

The Court: No analysis. I can see the picture as it is developing now and understand each of your positions, but just give me your memorandum.

Mr. Lasky: I assume when the case is submitted we will have an opportunity——

The Court: To fully argue it and submit all the authorities that you care to.

Mr. Erskine: Just a statement of the issues with a citation of authorities?

The Court: A statement of the issues as you view them and [194] a citation of authorities supporting your view?

Mr. Erskine: No quotation from those authorities?

The Court: No.

Mr. Erskine: Just a citation of them?

The Court: No, just a simple matter.

Mr. Erskine: No argument?

The Court: No argument.

Very well, the Court will stand in recess until ten o'clock Monday morning.

(Thereupon an adjournment was taken until Monday morning, June 19, 1950, at 10:00 a.m.) [195]

June 19, 1950, 10 A.M.

The Clerk: Merchandise National Bank of Chicago vs. Bank of America National Savings and Loan Association, on trial.

Mr. Lasky: If the Court please, in pursuance to your Honor's request for a memorandum that just states the propositions, I present here to the Court such a memo, in rather sketchy form.

Mr. Erskine: I am sorry to say, your Honor, that I haven't mine typewritten yet. It is being typewritten this morning, and I will have it at 2 o'clock.

The Court: Very well.

Mr. Erskine: If you would rather keep it until I get mine in?

Mr. Lasky: No, you may know what my contentions are; I have nothing to conceal.

Mr. Erskine: Mr. Messenger was on the stand.

The Court: Yes, take the stand, Mr. Messenger.

The Clerk: Mr. Messenger has been sworn.

FREDERICK C. MESSENGER
called as a witness on behalf of the plaintiff, resumed the stand, previously sworn.

Cross-Examination
(Resumed)

By Mr. Erskine:

Q. Now, Mr. Messenger, I believe that you [196] were testifying under direct examination of Mr. Lasky the other day that the United Produce Company had one account with the Merchandise Bank and that that account was evidenced by different

(Testimony of Frederick C. Messenger.)

ledgers: the checking account ledger, drafts discounted liability ledger, the notes discounted liability ledger, and the assigned accounts ledger. You gave that testimony, did you not, Mr. Messenger?

A. Yes.

Q. And I think you also testified in answer to questions put to you by Mr. Lasky that if the conditional credits which were entered on the basis of the checks that were introduced in evidence—

Mr. Lasky: They were marked for identification as plaintiff's No. 4.

Mr. Erskine (Continuing): The checks that were introduced in evidence and marked as Mr. Lasky has just stated, Plaintiff's Exhibit 4 for identification, which I now show to you, that if you deducted the conditional credits entered upon the basis of those checks from the credit balance to which the United Produce Company was entitled on the books of your bank, that there would not have been any credit to the credit of the United Produce Company against which the six checks could have been paid?

Mr. Lasky: Now, if the Court please, I will object to the words, "to which United Produce was entitled" as calling for a [197] legal conclusion.

Mr. Erskine: Yes, I agree that that is right, your Honor. Let me—although it is a long question—attempt to restate it.

Q. You testified, Mr. Messenger, that if the conditional credits given United Produce Company on the basis of the checks which have been marked

(Testimony of Frederick C. Messenger.)

Plaintiff's Exhibit 4 for identification in this case, were deducted from any credits to which the United Produce Company may have been entitled on your books, the result would be that there would have been no credit to the account of that company against which the six checks could have been paid?

Mr. Lasky: Well, I think the same objection there lies to the "may have been entitled." I suppose the question is addressed to any credit which appeared on the books or appeared to be there. That would be all right.

The Court: Yes, that is what it is directed at.

Mr. Erskine: Well, I will try once more. I am sorry to take up the time. I will try once more. I think what Mr. Lasky says is doubtless right.

Q. If those checks, Plaintiff's Exhibit 4, or if the conditional credits entered on the books of the Merchandise Bank, on the basis of those checks had been deducted from any credit which may have appeared to be to the credit of the United Produce Company on your books, there would not have been any apparent credit to the credit of that company on your books against [198] which the six checks could have been paid. That was your testimony?

A. Of course your question is quite long and involved, and you are asking me whether that was my testimony?

Q. Yes.

A. I don't think I could just answer and say that was my testimony, because I can't remember.

Q. Well, I think that your point is well taken.

(Testimony of Frederick C. Messenger.)

Let me read the testimony. That would be the quickest way.

The Court: Well, if it is there, why take up our time? If he has testified to it, it is there.

Mr. Lasky: He has testified to that general effect and substance.

Mr. Erskine: It is all preliminary. What is that?

Mr. Lasky: He has, I believe, testified to that general effect and substance.

Mr. Erskine: Yes. Well, all right. [199]

Q. (By Mr. Erskine): Is it a fact, Mr. Messenger, that the six checks were charged against what you termed fictitious credit on the books of your bank?

A. They were charged against the balance appearing on the commercial ledger, which had conditional credits entered on that ledger sheet.

Q. Did you testify upon the taking of your deposition the reason the checks were paid in error was they were charged against fictitious credit?

A. That was last December, and just exactly what my answers were to specific questions—

Q. I haven't got the exact reference but I will pick it up later.

I wanted to put those questions, which I did not do very aptly, for this reason, your Honor: That statement the witness made the other day raises a lot of legal points. Your Honor will recall I objected to the question upon that ground. Now, I can either do one of two things. I can either cross-examine this witness for the purpose of showing what he means

(Testimony of Frederick C. Messenger.)

when he says that the six checks were charged against conditional credit appearing on the books of the United, and that as those conditional credits were not true credits, the charge of the checks was made by mistake. I do not say that that is what he testified to, but I believe that is the position of the plaintiff. I can either cross-examine him for the purpose of [200] showing what he means by that, and if I do cross-examine him in that way I will have to introduce and have marked for identification the commercial account of the United Produce Company with the bank, the ledger, the draft ledger, discount ledger of that company with the bank and the other ledger which he has mentioned in his testimony, and I will attempt on the basis of that cross-examination to show exactly what he means by conditional credit. I could either do that or we could follow the course which we followed on Friday—I believe it was Friday—of trying to arrive at a stipulation with respect to those facts, and I think it will save time and it will be clearer if we adopt the course of attempting to arrive at a stipulation so that we can determine exactly what this witness means when he talks about conditional credit.

Mr. Lasky: Whichever you prefer, because if you did not put in those particular sheets we are talking about or samples of them, I had proposed to do so, so the Court would get the basic facts. If you wish to try to work out a stipulation on it, I will cooperate. I think we can help it along. And in that event I would reserve the right of some redirect

(Testimony of Frederick C. Messenger.)

examination of the witness relative to the subject, if we were not able to stipulate to the whole thing.

The Court: You could probably do it in fifteen minutes or so right now, could you?

Mr. Erskine: I think we can do it right now, but it might [201] take a little longer.

Mr. Lasky: There is no mystery about it.

The Court: That is what I say. It seems to me you can work that out. Did you want to do it in chambers with me or just work it out yourself?

Mr. Lasky: I think in chambers with the Court would be an excellent idea.

Mr. Erskine: I think so, too.

The Court: Very well. The Court will stand in recess.

(Recess.) [202]

June 19, 1950, 2:30 P.M.

The Clerk: Merchandise National Bank vs. Bank of America, on trial.

Mr. Erskine: Was it the understanding that I would try to state that stipulation with respect to the payment of the six checks now?

Mr. Lasky: Yes, I think you might as well, not with respect to the payment, but with respect to the handling.

Mr. Erskine: Yes, that is right. The six checks which have been introduced in evidence in this case and marked Defendant's Exhibit E, the facts with respect to the handling of those six checks were these: I might say I will not try to cover the facts

(Testimony of Frederick C. Messenger.)
relating to them that have already been covered by stipulations.

Prior to the time that the checks were sent forward by the Bank of America they were endorsed by the Bank of America as follows: "Pay to the order of any Bank or Trust Company, all prior endorsements guaranteed, November 13, 1948, East Bakersfield Branch, Bank of America National Trust and Savings Association, Bakersfield, California." Each of the checks was so endorsed. When the checks were received at the Merchandise Bank November 15, 1948, the Merchandise Bank sent out a form of acknowledgment of the receipt of the checks, copy of which I would like to introduce in evidence and have marked Defendant's Exhibit next in order. [203]

(The form of acknowledgment referred to was thereupon received in evidence and marked Defendant's Exhibit F.)

Mr. Erskine: On the same day, that is, on November 15, the Merchandise Bank sent out the document which has already been introduced in evidence and marked Defendant's Exhibit A for identification. The stamp appearing upon the face of this document, Defendant's Exhibit A, reading "Paid, November 15, Merchandise National Bank of Chicago" is the stamp of the Merchandise Bank and was put on the advise of credit on that date. I might say that when the six checks were sent forth by the Bakersfield Branch to the Merchandise National

(Testimony of Frederick C. Messenger.)

Bank, they were accompanied by a so-called Collection Letter dated November 13, 1948, which I would like to have introduced in evidence and marked Defendant's Exhibit next in order.

(The collection letter referred to was thereupon received in evidence and marked Defendant's Exhibit G.)

Mr. Erskine: The stamp appearing upon the face of this Defendant's Exhibit G, "Paid November 15, 1948, Merchandise National Bank of Chicago," was put on there by the Merchandise National Bank and is the stamp of that bank. There appears upon the face of this Defendant's Exhibit G, an arrow in pencil above which appears the words "Mail to" that arrow and those words were written on Defendant's Exhibit G by an employee of the Merchandise National Bank, and on November 15 this document, Defendant's Exhibit G, was mailed by the Merchandise Bank back to the Bank of [204] America.

Mr. Lasky: You say "back to." It happened to be mailed to the head office.

Mr. Erskine: It was mailed to the head office, or, shall we say, the central office of the Bank of America located in San Francisco, on that date, November 15, 1948, and the document marked Defendant's Exhibit F, and the acknowledgment, and the document marked Defendant's Exhibit A, the advice of credit, were mailed by the Merchandise Bank on November 15, 1948, to the central office of the Bank of America.

Mr. Lasky: No, the advice of credit, Exhibit A, was mailed out to the central office.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: Went to Bakersfield?

Mr. Lasky: I think the acknowledgment went directly to Bakersfield, that is correct.

Mr. Erskine: My mistake, the document marked Defendant's Exhibit F, the acknowledgment, was mailed directly to the East Bakersfield Branch by the Merchandise Bank on November 15, whereas the advice of credit, Defendant's Exhibit A, was mailed by the Merchandise Bank to the Central Office of the Bank of America in San Francisco.

On November 16, pursuant to the practice of Post dating, the Merchandise Bank debited the six checks against the account of the United Produce Company in its bank, and pursuant to the same practice of post-dating, which will be explained later by a [205] stipulation, the Merchandise Bank credited, as of November 15, the account of the Bank of America—

Mr. Lasky: Let us leave out for a moment what was done with the account of the Bank of America, because that is a somewhat different situation. Leave it out for a second and go on with your other matters.

Mr. Erskine: I think I said that pursuant to the practice of post-dating the Merchandise Bank debited the six checks on November 16 to the account of the United Produce Company, the commercial account of the United Produce Company, that debit appearing upon the commercial account of that company as of November 15, 1948, and that same day, November 15, 1948, the Merchandise Bank perforated

(Testimony of Frederick C. Messenger.)
each of the six checks with a stamp "Paid, November 15, 1948."

The Merchandise Bank kept an account showing the relationship between it and the Bank of America as part of the books of the Merchandise Bank and that on November 16, as of November 15, the Merchandise Bank credited the Bank of America with the amount of the six checks.

Mr. Lasky: Entered a credit entry on that particular ledger sheet in that amount, yes.

Mr. Erskine: I will accept the statement Mr. Lasky just made.

Mr. Lasky: Will you add to that, to save some interrogation, that this ledger sheet maintained by Merchandise National Bank [206] of this account with the Bank of America was a "Due from" account with the Bank of America, not "Due to," and that it was regularly kept and intended solely for internal use and that no transcript copy or portion of it ever did go out to the Bank of America or ever was intended to go out to the Bank of America.

Mr. Erskine: I am not sure of that factor. I will ask Mr. Tobey.

I think that if there is a question between us with respect to that particular matter, would like to offer the ledger sheet itself in evidence so the Court can see it.

Mr. Lasky: That is all right. I have no objection.

Mr. Erskine: We have it here, and unless coun-

(Testimony of Frederick C. Messenger.)

sel wants to make any explanation of it that he wants to make by testimony, he can do so, but we do not know enough about it to admit it.

Mr. Lasky: Very well.

Mr. Erskine: So far as I am concerned, those are the facts with respect to the six checks. If counsel at this time wants to state what was done with respect to charging back those six checks against the account, I will be willing, I am quite sure, to agree to it. But I understand my statement up to this point is agreed to.

The Court: It is agreed to and stipulated.

Mr. Lasky: It is agreed to and stipulated. Of course, it is understood when counsel says Merchandise National Bank sent out the advice and perforated the checks, the stipulation is that [207] the employees, people in the employ of the Bank did so.

The Court: I do not know how else the Bank could do it if it did not do it through employees.

Mr. Erskine: In view of what counsel has said, I would like to say this, that all the acts described, which I have attempted to describe, were done in accordance with a regular routine and practice of the Bank. That was testified to.

Mr. Lasky: It was a routine and practice which was followed with respect to collections where there were funds against which to pay, yes.

Mr. Erskine: Without any qualification, all of those acts were done in accordance with practice and routine of the Bank in dealing with checks presented for payment.

(Testimony of Frederick C. Messenger.)

Mr. Lasky: Where checks came into the bank on a collection letter and are drawn against accounts in that bank there are funds to meet it; that is the routine it went through, of course.

The Court: That is the routine it went through in this instance.

Mr. Lasky: It certainly was the routine it went through in this instance, no question.

Mr. Erskine: What is that?

Mr. Lasky. The Court added "and that was the routine that was followed with respect to the checks in this instance," and I said "certainly so."

Mr. Erskine: Of course, you see Mr. Lasky says where there [208] are funds to meet it.

Mr. Lasky: All right, I think we are fencing for nothing.

Mr. Erskine: I think we are too. It was the routine. The six checks were handled and the acts which I have described were performed with respect to them.

The Court: In a routine manner.

Mr. Erskine: In accordance with a regular practice and routine of the bank, is that right?

Mr. Lasky: Well, I do not see any hidden hooks on it, and it sounds all right to me, yes. That is the routine that would be followed.

Mr. Erskine: That is all I have to say. If you want to talk about the charging of those checks now, I will agree to what you say.

Mr. Lasky: All right. [209]

(Testimony of Frederick C. Messenger.)

Mr. Erskine: As of the 19th—on the 20th, as of the 19th.

Mr. Lasky: Well, pursuant to the practice of post-dating.

Mr. Erskine: That's right.

Mr. Lasky: On the 20th as of the 19th the six checks, the credit for the six checks on the commercial ledger sheet of the United Produce Company was reversed, a reversing entry, stating that it had been entered in error. Am I correct in that?

Mr. Erskine: Did it show on the commercial ledger sheet that it was entered in error?

Mr. Lasky: I am not sure of my memory on that. The witness had that. Here we are.

Mr. Erskine: Mr. Tobey calls to my attention the fact that that acknowledgment went to San Francisco first and not to Bakersfield.

Mr. Lasky: Doesn't have any such stamp on it.

No, I withdraw my statement that they had a notation. The reversing entries were entered on the 20th as of the 19th.

Mr. Erskine: Without any notation as to—

Mr. Lasky: There wasn't any notation. Then on the due from account, that has been described as the Bank of America account, also on the 19th, there was a reversing entry entered, and that did have some notation.

Mr. Erskine: Well, we will get that for you right away.

Mr. Lasky: Perhaps the witness could find the original of it. [210]

(Testimony of Frederick C. Messenger.)

(Witness left the witness stand and examined files.)

Mr. Erskine: Do you want to use this?

Mr. Lasky: Yes, there is an entry. I have it here. There is an entry under date of the 19th, \$113,000 is the first with a notation "Rev.," the abbreviation for "reversing," an entry of eleven fifteen, United Produce, collection—"Coll.," and then "6919."

Mr. Erskine: Now I would like to offer this in evidence.

Mr. Lasky: Of course I have no objection. I thought we were eliminating all such by the stipulations. Otherwise, the sheets speak for themselves.

Mr. Erskine: That's right, but in view of the question as to the effect of this particular sheet, I want to show the character of the sheet.

The Court: Very well, have it marked and it will be admitted in evidence.

Mr. Lasky: No objection.

Mr. Erskine: I would like to show it to the Court.

The Clerk: Defendant's Exhibit H in evidence.

(Whereupon photostat of bank ledger sheet referred to above was received in evidence and marked Defendant's Exhibit H.)

Mr. Erskine: I think your Honor might be interested in seeing this one, and if you will permit me to, I will show it to you and call your attention to the entries. There is the [211] credit made as of the

(Testimony of Frederick C. Messenger.)

15th, and here is the off-set made as of the 19th (document examined by the Court); that is the account kept by the Merchandise Bank to show its business transactions with the Bank of America.

The Court: Is this the account with which—I see, yes. I see. The notation is here on the left.

Mr. Lasky: That's right.

The Court: Yes, very well.

Mr. Erskine: That is correct—my statement—Mr. Lasky, that that is the ledger sheet of the account kept by the Merchandise Bank to show its business transactions with the Bank of America?

Mr. Lasky: It is true as far as it goes, yes. It is a true copy.

Mr. Erskine: Now I think that we might be able to stipulate to one other series of facts, here.

Mr. Lasky: Of course, talking about orderly procedure, it seems to me the defense is putting in its evidence. I have no objection, but it might be more orderly if we get the plaintiff's case in.

The Court: If it is here, let's put it in. Matters that you refer to necessarily are part of your case. If you have an exhibit that should be in evidence and it can now be stipulated to, let's get it in and get it over with.

Mr. Erskine: I was going to ask the witness certain [212] questions with respect to these documents as part of my cross-examination, but I think that Mr. Lasky and I, who are both—

Mr. Lasky: Well, you have before you the in-

(Testimony of Frederick C. Messenger.)

ternal documents of the Bank of America, about which this witness would know nothing.

Mr. Erskine: Yes. Well, part of them are internal documents of the Bank of America; part of them are documents received by it from Merchandise.

(Conversation among defendants out of hearing of reporter.)

Mr. Lasky: I would respectfully suggest to the Court that we get on with the cross-examination of the witness so we can proceed with the trial.

The Court: Well, counsel is looking through some papers there. He may take his time.

Mr. Erskine: I will put it upon cross-examination.

The Court: Very well, proceed.

Q. (By Mr. Erskine): Mr. Messenger, do you recall the Merchandise Bank receiving from the Bank of America a collection letter accompanying four checks drawn by the United Produce Company to the order of Lofendo, aggregating \$89,613.10?

Mr. Lasky: Just a moment. I object to it, if the Court please. There is no cross-examination of anything on direct, and I am not sure what it is.

Mr. Erskine: Well, it is cross-examination, your Honor. The purpose of it will appear very soon, and I can assure the [213] Court that it is proper cross-examination. This witness testified with respect to the six checks, that the six checks were charged in error against the account, and I want to show in

(Testimony of Frederick C. Messenger.)
an exactly similar situation, a similar contention was not made, which certainly has a bearing upon the witness' testimony that the six checks were charged in error.

The Court: Very well, proceed. The objection is overruled.

A. Your question is that I have knowledge that there was such a collection?

Q. (By Mr. Erskine): That's right.

A. Yes, I have.

Q. Now I show you a document—

Mr. Erskine: Will you mark that for identification, please?

The Clerk: Defendant's Exhibit I for identification.

(Whereupon copy of collection letter referred to above was marked Defendant's Exhibit I for identification only.)

Q. (By Mr. Erskine): I show you a document, Mr. Messenger, which has just been marked Defendant's Exhibit I for identification, and ask you if that is not a copy of the collection letter to which I have just referred?

A. I don't think this is a copy of the collection letter itself. It is the Bank of America's permanent record, perhaps, but it might cover the same [214] items.

Mr. Lasky: Well, the witness doesn't know what it is. It is a Bank of America record. He is guessing what it might be.

Q. (By Mr. Erskine): Well, at any rate, Mr.

(Testimony of Frederick C. Messenger.)

Messenger, if you can't identify this, I will ask the Clerk—

Mr. Erskine: —to mark these papers. Mark them all as one exhibit, if that is all right.

The Clerk: Defendant's Exhibit J for identification.

(Whereupon documents referred to above were marked Defendant's Exhibit J for identification only.)

Q. (By Mr. Erskine): I will ask you whether or not the Merchandise Bank sent to the Bank of America the documents which have just been marked, the four documents which have just been marked Defendant's Exhibit J for identification?

Mr. Lasky: Well, of course, while reserving the objection I made before that this isn't cross, I will stipulate that those are documents which Merchandise did send to the Bank of America, according to the various representations or stamps that appear on them.

Mr. Erskine: What was that?

Mr. Lasky: In accordance with any representations or stamps that appear on the face. They show the dates.

Mr. Erskine: Yes.

Mr. Lasky: And I will stipulate that they were so sent out. [215]

Mr. Erskine: That they were sent out and that the notations and stamps appearing on them are the notations of the Merchandise Bank and the stamps of the Merchandise Bank?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: Some notations are those and some are the other. I think they rather speak for themselves.

Mr. Erskine: Where are the notations of the Bank of America?

Mr. Lasky: I am mistaken. That's right. You are correct; all notations were put on by the Merchandise Bank.

Mr. Erskine: Yes.

The Court: Very well.

Mr. Erskine: And the stamp "Paid" on each one of these four documents is the stamp of the Merchandise Bank, is that right?

Mr. Lasky: That's right.

Mr. Erskine: And the four checks received, four checks to which those documents relate, the documents marked Defendant's Exhibit J for identification, were received with the form of collection letter similar to the collection letter which has been introduced in evidence and marked Defendant's Exhibit G?

Mr. Lasky: Similar form. I will stipulate to that, but object to the fact as immaterial. This relates to an earlier collection item over which no question has been raised. You could go back and get many more, I imagine.

Mr. Erskine: And similar to the collection letter marked [216] Defendant's Exhibit G, except that it was dated November 10th instead of November the 13th.

Mr. Lasky: Well, I mean, if you are going to

(Testimony of Frederick C. Messenger.)

find differences of dates, there are differences in amounts. It is a similar form.

Mr. Erskine: Similar form, except that the collection letter which accompanies the four checks was dated November 10th.

Mr. Lasky: And with other exceptions. It has different checks and different amounts.

Mr. Erskine: Yes, that's right. Different checks and different amounts and different dates. And the difference in date is that the collection letter relating to the four checks was dated November 10th, whereas the collection letter relating to the six checks was dated November 13th.

Mr. Lasky: Well, I have stated what I stipulate to. I don't know that I can clarify it. The same form was used, with the inserts in the banks, different, since it related to a different transaction on a different date, involving different checks in different amounts.

Mr. Erskine: That's right. But I still haven't got any proof of the date of the collection letter accompanying the four checks.

Mr. Lasky: Well, was it November the 10th?

Mr. Erskine: It was November 10th.

Mr. Lasky: Well, you show me some Bank of America document [217] that indicates that, and I will stipulate that that is a fact. But also object to its materiality.

Mr. Erskine: That is all right.

The Court: Very well.

Q. (Mr. Erskine): Now, Mr. Messenger, you

(Testimony of Frederick C. Messenger.)

have testified that the advice of credit which I am now showing to you, Defendant's Exhibit A for identification, relating to the six checks and sent out by your bank on November the 15th, was sent out in error; that is correct, is it not?

A. Yes, sir.

Q. And it was sent out in error because there were no credits, real credits, to the account of the Merchandise Bank against which the six checks could be charged, is that right?

A. There were no funds to pay.

Q. Yes. Or no real credits to pay, is that right?

A. That's right.

Q. Now, Mr. Messenger, I will show you these four advices of credit marked Defendant's Exhibit J for identification, which were sent out by your bank on November 12th, and I will ask you to explain what, if any, difference there was between the four checks referred to in the documents just shown to you, Defendant's Exhibit J, and the six checks.

Mr. Lasky: May I have that question read back, your Honor?

(Record read.)

Q. (By Erskine) (Continuing): So far as charging those [218] checks against the account of the United Produce Company is concerned. What difference was there between charging the four checks and charging the six checks?

Mr. Lasky: You mean in the routine that was followed?

(Testimony of Frederick C. Messenger.)

Mr. Erskine: No. Well, I had better go back again.

Q. You said, as I understood you, Mr. Messenger, that the six checks were charged in error because there were not any credits to the account of the United Produce Company, any real, true credits to the account of the United Produce Company, on November the 15th, against which the six checks could be charged; that's correct, is it not?

A. There were no true balance, no real balance, which they could be charged against.

Q. Then did you charge the four checks referred to in Defendant's Exhibit J against the account of United Produce Company—on what date?

A. The entry was made on these collections on November the 12th, and at that time these advices were sent out in error. There were no—

Q. I didn't ask you that. I asked you when you made the entry; when did you make the entry?

A. The collection was handled on November the 12th. [219]

Q. And the entry was made as of November 12th on November 13th, is that right?

A. The actual entries through the commercial ledger sheet.

Q. And when I refer to the four checks, Mr. Messenger, I will be referring to the checks referred to in this defendant's Exhibit J for identification. You will understand that, will you?

A. Yes, sir.

Q. Tell me, Mr. Messenger, was there any error made in the entry, in the charging of the four checks

(Testimony of Frederick C. Messenger.)
against the account of the United Produce Company? A. Yes, there was.

Q. What was that error?

A. Exactly the same error as that appeared on the six checks for \$113,216.50.

Q. That is, the error was that there was no true balance credited to the account of United Produce Company on the books of the Merchandise Bank on November 12, 1948, against which the four checks could be charged, is that correct?

A. That is correct.

Q. Did the Merchandise Bank ever make a claim against the Bank of America that the four checks had been charged against the account in error?

A. No.

Mr. Erskine: I think we will be able to stipulate to some [220] additional facts. Now, Mr. Lasky, as part of my cross-examination of Mr. Messenger.

Q. When did the Merchandise first hear from the Bank of America that any of the checks drawn by Lofendo to the order of the United Produce Company and presented to the Bank of America for payment had been rejected?

A. On November 15th the bank received a wire with reference to the rejection of checks.

Q. On November 15th Merchandise Bank received a wire from the Bank of America that certain Lofendo checks to the order of the United Produce Company had been presented to the Bank of America for payment and had been rejected, is that right? A. That is right.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: Have you got that wire here? Mr. Lasky, have you got that wire?

Mr. Lasky: I have if it is marked as one of the exhibits. Do you have the exhibit number?

Mr. Messenger brought out with him all the papers that were marked in Chicago, so if you will tell me the number we will find it.

Mr. Erskine: Without taking the time, we can introduce it later, and I think Mr. Lasky will stipulate to it.

Mr. Lasky: I will stipulate to all documents even though I may object to the materiality of their introduction.

Mr. Erskine: Mr. Messenger, when you received that wire [221] which we will produce or try to produce later, notifying you of the rejection by the Bank of America of three checks, did you prepare a wire, copy of which I am now showing you?

I had better mark this for identification.

Mr. Lasky: In your question, when you say "you"—

Mr. Erskine: I mean the Merchandise Bank.

The Court: You can probably stipulate with reference to that.

Mr. Erskine: Will it be stipulated that this paper that is marked Defendant's G for identification is a copy of a wire sent by the Merchandise Bank to Mr. Dunlap of the Bank of America?

Mr. Lasky: I will stipulate to that fact but I object to it as neither being material nor being any part of the examination or cross-examination of this

(Testimony of Frederick C. Messenger.)

witness. It has no relationship to anything asked on direct.

Mr. Erskine: I think it has this relationship, your Honor: It shows—

The Court: You are still showing the difference between the method of handling in the one instance—

Mr. Erskine: No, this is a different matter.

The Court: What does it go to then?

Mr. Erskine: This shows that the witness has testified to what happened in the Merchandise Bank of November 17th, the fact that he called up Mr. Etribou on that day, and I want to [222] show, as part of the circumstances relating to that call, this wire. They received a wire on November 15th that the Bank of America had rejected three checks. Then on November 17th the three checks arrived at the bank, the Merchandise Bank, on that day the witness sent out this wire—

Mr. Lasky: The witness did not send this out, definitely not.

Mr. Erskine: My recollection is he prepared this wire and sent it out.

The Court: Do you know what Defendant's Exhibit K for identification is (handing a document to the witness).

A. It is a coded wire to the Bank of America that went out from the Merchandise Bank.

Q. Did you prepare it? A. Yes, sir, I did.

Q. And had it sent? A. Yes, sir.

Mr. Lasky: While I was mistaken in my im-

(Testimony of Frederick C. Messenger.)

pression of who prepared it, I still submit it is not proper cross-examination. The witness testified nothing in relation to that wire. He testified to a conversation had on the telephone, and he testified to the fact that there was no balance against which the checks could be honored. This is something else again.

Mr. Erskine: It may be counsel is right. I can either prove it now or later. [223]

The Court: Let us prove it later then.

Mr. Erskine: All right, I will prove it later. I would like, if the Court please, to ask that the Defendant's Exhibit J for identification be admitted in evidence.

The Court: Those are the four checks—

Mr. Erskine: Those are the advices of credit relating to the four checks.

Mr. Lasky: I have stipulated to them but made an objection to their admissibility.

The Court: To their admissibility at this point, on the ground that they are immaterial.

Mr. Lasky: Yes, and at this point, and at every point, as being immaterial.

The Court: The objection is overruled.

(Defendant's Exhibit J for identification was thereupon received in evidence.)

Mr. Erskine: That is all so far as Mr. Messenger is concerned.

Mr. Lasky: I have a very few questions. Of course, Mr. Erskine and I are still to put in stipula-

(Testimony of Frederick C. Messenger.)

tion form the material we discussed this morning with respect to the relationship between the two accounts, and if we fail to do that I will ask permission as to call this witness for further questions.

The Court: There will be no failure on that. We have already been over it once. [224]

Mr. Lasky: I hope so.

Redirect Examination

By Mr. Lasky:

Q. With respect to the collection item of \$89,000, Mr. Messenger, concerning which you have just been asked, the advice of credit went out from your bank on the 13th?

A. My recollection is the 12th?

Q. When you talked to Mr. Etribou on the 17th, did he state to you anything indicating whether or not that had already been received.

A. He made a statement to me that there were two outstanding collections totalling \$165,000 that had not been accounted for. One was the \$113,000 figure and was one for \$52,000. There was no mention made of a \$89,000 item.

Q. At the time did you have this collection item before you? A. I did have.

Mr. Erskine: What collection item?

Mr. Lasky: The \$89,000 that you brought up.

The Court: Is that the one evidenced by the four?

Mr. Lasky: The ones that I objected to, yes.

Q. After Mr. Etribou told you there were only

(Testimony of Frederick C. Messenger.)
two outstanding collections, was this included among those two? A. It was not.

Q. Did you conclude that this advice of credit had already been received by the Bank of America? [225] A. I had.

Mr. Erskine: Just a second. I suppose I can object to that upon the ground that his conclusion is not material.

The Court: The answer may be stricken and the objection is sustained.

Q. (By Mr. Lasky): Counsel has asked you whether or not Merchandise Bank has made any claim against Bank of America with respect to this \$89,000. I ask you why or the reason why Merchandise Bank made no claim against Bank of America with respect to this item.

Mr. Erskine: I object to that as calling for a conclusion of the witness and being incompetent, irrelevant and immaterial. The fact is the important thing.

Mr. Lasky: If the Court please, counsel has brought up some other collection and brought out the fact that no claim was made on it, as having some relevance to this case. I objected to the materiality. Now, if it is material, then it is material why the Merchandise Bank has made no claim on it.

The Court: Why it was handled in a different fashion.

Mr. Lasky: Yes. We handled it up to a certain point the same and then instead of making a claim we have not. Now, I want the witness to state why.

(Testimony of Frederick C. Messenger.)

The Court: The objection is overruled. You may answer.

A. There was no claim made on the \$89,000, no attempt to rescind credit because the conversation taking place with Mr. [226] Etribou of the East Bakersfield branch indicated to me and to Merchandise National Bank that the collection had been entered on their books. I was informed there were only two collections outstanding and the \$89,000 was not included with those two. The only thing that I could believe was that the \$89,000 had been entered through the books of the Bank of America. Therefore, we did not request any recision of credit.

Mr. Lasky: At the time you telephoned to Etribou?

A. That is right.

Q. Now, Mr. Messenger, with respect to the document that *has marked* Defendant's Exhibit H, general ledger of the account of the Bank of America, Merchandise National Bank, would you state the nature of that ledger sheet and purpose for which it is kept in your bank?

A. This is an internal document used by the bank for the purpose of keeping track of the transactions between the Bank of America and the Merchandise National Bank.

Q. Were any copies of it ever sent to the Bank of America at any time during the life of the account? A. No.

Q. Was any transcripts of it sent to the Bank of America at any time? A. No.

(Testimony of Frederick C. Messenger.)

Q. Was any statement drawn off of it sent to the Bank of America at any time? [227]

A. No statement of it was drawn off.

Q. Now, were the six checks we have been referring to, Defendant's Exhibit E, ever turned over at any time to United Produce Company?

A. They were not.

Q. Or to its trustee in bankruptcy?

A. They were not.

Q. Mr. Messenger, on your cross-examination you were shown Defendant's Exhibit 3B. You *were* recall this document being one part of the memorandum that you prepared after the telephone conversation. You were shown this sentence on the last page of 3B: "Mr. Etribou said he would do everything possible to help us in our problem and would be glad to discuss the matter with Mr. LeRoy when he arrived." Now, Mr. Witness, I show you here page 3A, the first page of the same memorandum, and I call your attention to the last paragraph on that page, reading as follows:

Mr. Erskine: Just a second, if the Court please. I object to this question on the ground it is not proper redirect examination. The witness certainly cannot be led with respect to what was said in that conversation. The document which counsel is reading to him is not in evidence. It is just a memorandum made by the witness at the time that the conversation took place. I consider the question highly improper to read to the witness a part of

(Testimony of Frederick C. Messenger.)

that memorandum in order to ask him whether something of that sort was said. [228]

The Court: That is a well-taken objection. The witness testified that he used the memorandum he referred to to refresh his recollection, didn't he? It has no other purpose in evidence. It is not in evidence.

Mr. Lasky: No, I did not offer it in evidence for that reason. This is why I bring it up now: Counsel in cross-examining—and I suppose for the purpose of impeaching the witness—showed him *once* sentence and asked him if his *testify* therefor was erroneous that he had given before.

The Court: And he said yes, it was.

Mr. Lasky: Yes, and at the time I suggested the rest of the memorandum be shown to him in fairness, because the rest of the memorandum has something else on the same point, showing his memory was not erroneous.

The Court: You can ask the witness, of course, what his memory is of the transaction. That is not in evidence and it cannot be used by you in establishing the truth of what the occurrence was.

Mr. Lasky: I am not so sure of that because a document written immediately afterwards may be good evidence.

The Court: Oh, it may be if it was kept in the regular course of business. It may very well be. It has not been offered for that purpose. It has not been accepted for that purpose. It was used merely to refresh his recollection. His testimony is what

(Testimony of Frederick C. Messenger.)

we receive in evidence. What is on that paper is not [229] received in evidence.

Mr. Lasky: No, but am I not entitled to use it now in an attempt to refresh his recollection to see whether when he said he testified wrongly—

The Court: No, not until his memory is exhausted.

Mr. Lasky: He has already testified—

The Court: He has already testified to everything. What are you going to do, go over the same ground?

Mr. Lasky: No, Your Honor, but it seems to me highly improper for counsel to pick one sentence out, and without having shown the witness the remainder, suggest to the witness and lead the witness in saying he was erroneous in his testimony.

The Court: You may ask him if he has any explanation to give in answer to that, but he need not refer to the document. His memory has been clear. He testified on direct examination without reference to the memorandum and said he did not need to refer to it.

Mr. Lasky: Well, he testified without it. I submitted it to him and he said there was nothing more he wanted to add to it.

The Court: Now you can ask him if he wishes to make any explanation of the testimony he gave on direct examination.

Mr. Lasky: Very well, Your Honor, I will do that.

Q. Mr. Messenger, counsel called your attention

(Testimony of Frederick C. Messenger.)

to this last sentence on one page of the memorandum: "Mr. Etribou said he [230] would do everything possible to help us in our problem and would be glad to discuss the matter with Mr. LeRoy when he arrived." You were asked whether you were in error in making a statement that that had not occurred in the telephone conversation. Have you any explanation to make of that?

Mr. Erskine: I do not know about that. The form of the question strikes me as very odd, Your Honor. What I asked the witness was simply this: I said, "Isn't it a fact that Mr. Etribou told you he would do what he could to help out the Merchandise Bank and that he would discuss the matter with Mr. LeRoy when Mr. LeRoy arrived in Bakersfield."

The Court: Yes.

Mr. Erskine: I asked the witness that and the witness said no, he didn't tell me that.

The Court: When you called his attention to the memorandum.

Mr. Erskine: I called his attention to the memorandum.

The Court: And he said, "I was mistaken. He did."

Mr. Erskine: "I was mistaken. He did tell it to me."

The Court: Yes.

Mr. Erskine: Now, all this beating about the bush with these questions—

Mr. Lasky: My purpose is the witness had

(Testimony of Frederick C. Messenger.) already testified more fully to that conversation then and what else you said about what would happen when LeRoy arrived, and this counsel [231] by taking this one sentence, sought to restrict what the witness had said about it when in fact what he fully had said on it is correct and otherwise appears in the memorandum.

Mr. Erskine: I was not trying to restrict his previous testimony at all. I was trying to find out whether he really remembered that conversation, and I asked him whether or not it was a fact that that was said and he said, "No." It was proper cross-examination and I do not believe counsel can read it to him and read other parts of the memorandum to him for the purpose of qualifying that very clear occurrence. [232]

The Court: Yes, counsel, I don't understand your position. The facts are as stated by Mr. Erskine, that upon examination he was asked if a certain thing wasn't said. He said, "No, it wasn't." Mr. Erskine then handed him the memorandum and said, "Now, will you read that, and now do you say as to what the conversation was," and he said, "the conversation is as—the matters were discussed." Now if he made an error in saying that, you may have him explain how he made an error in saying it.

Mr. Lasky: Well, I will ask him this question.

The Court: But you may have the witness explain any error he made; but I don't see what it has to do with the memorandum.

(Testimony of Frederick C. Messenger.)

Mr. Lasky: I don't think the witness made an error.

The Court: Well, then—

Mr. Lasky: Well, I will ask the witness this question:

Q. With respect to this particular statement that you have testified to Mr. Erskine, that Mr. Etribou stated he would do everything possible to help you in your problem and would be glad to discuss the matter with Mr. LeRoy when he arrived, will you state the remainder of the conversation on that subject?

A. That was a finishing conversation. The original part of the conversation was that there was a definite recission and agreement. [233]

Mr. Erskine: Wait a second, now. I ask that go out, your Honor, that there was a definite recission. That is a statement of a conclusion.

The Court: That is a conclusion.

Mr. Erskine: He can just state the conversation.

A. (Continuing): That I had stated to Mr. Etribou that we were rescinding the credit, and Mr. Etribou had agreed to it.

Mr. Lasky: Well, don't—State what he said, not that he agreed.

A. (Continuing): Mr. Etribou said, "We will do whatever you want us to do. We will pay checks—"

Mr. Erskine: Are you reading from something now?

The Witness: No, sir.

(Testimony of Frederick C. Messenger.)

Mr. Lasky: He has that ledger sheet.

The Witness: That wasn't taken away from me.

A. (Continuing): "We will either pay checks or not make entry, whichever you wish us to do." And we said, I said, "We do not want you to make entry."

Q. Well, I am directing your attention particularly to the conversation in which Mr. LeRoy was mentioned.

A. That was the finishing of the conversation, and he said that he would work with Mr. LeRoy, discuss the thing, see what can be done. It wasn't just a problem, one problem of \$113,000; it was the whole problem of returned checks and everything.

Mr. Lasky: I offer this—— [234]

Mr. Erskine: Well, I ask the last statement of the witness go out, that it wasn't only one problem, it was the other problem. That is the statement of his conclusion. I don't understand that that was part of the conversation. That is just an explanation.

The Court: It may be stricken.

Mr. Lasky: Now, if the Court please, I offer Plaintiff's 3-A and B, which are now marked for identification, in evidence as a document made immediately after the conversation, when the memory was fresh and ripe.

The Court: Let me see it.

Mr. Erskine: I object to it, if Your Honor please.

The Court: It is offered for what purpose?

(Testimony of Frederick C. Messenger.)

Mr. Lasky: In evidence.

The Court: For what purpose?

Mr. Lasky: As evidence of the conversation, because it was made immediately after the conversation.

Mr. Erskine: I object to it, if the Court please, on the ground, it is incompetent, irrelevant, and immaterial, it purports to be nothing but a contemporaneous memorandum which a witness may use to refresh his recollection—if his recollection is not sufficient without reference to the memorandum. It is not a memorandum kept in the ordinary and usual course of business in order to state facts occurring contemporaneously with certain entries. It is not admissible for any purpose [235] whatever, and I object to it on those grounds.

Mr. Lasky: A memorandum, as I understand, which has been made at the time in question and has been preserved, may be used in evidence.

The Court: Well,—

Mr. Erskine: It is, in addition to that,—

The Court: Well, that would depend on all the other circumstances, whether it may be admitted in evidence.

Mr. Erskine: Let me say it is—

The Court: I don't see it is admissible here, counsel. The witness has testified to the conversation. He has testified that he knows the—he related the conversation fully. He didn't have to refer to the memorandum. This is not past recollection recorded; he made it entirely to refresh his memory,

(Testimony of Frederick C. Messenger.)

and he said he didn't have to use it to refresh his memory. He didn't have to use it for that purpose; looking at it, he didn't even have to look at it to recall the whole conversation.

Mr. Lasky: Well, he looked at it afterwards and then found he had nothing to add.

The Court: Well, looking at it and finding that he had nothing to add, it is of no value to us. He has testified to what the conversation is, and I will sustain the objection.

Mr. Lasky: That is all, Mr. Messenger.

Recross-Examination

By Mr. Erskine:

Q. So as I understand you, Mr. Messenger, the difference between the four checks and the six checks is that you inferred from your conversation with Etribou that the Bank of America had entered the credit relating to the four checks in its books, whereas when you talked to Etribou on the 17th, the Bank of America had not entered the credit relating to the six checks; is that the difference?

A. I assumed that the advice of credit for the \$89,000 had been received and acted upon, where the advice for the \$113,000 had not been received; so therefore no action taken thereon.

Q. I thought you talked about the fact that you inferred that the Bank of America had entered the credit on the four checks from your conversation

(Testimony of Frederick C. Messenger.)
with Etribou on November the 17th. Is that a fact?
Did you infer that?

A. No, I had no knowledge what entries they had made. I was advised that there were only two collections outstanding, and I had collections for three different groups in front of me. If there were only two outstanding, I could only assume that the matter had been handled by the East Bakersfield branch.

Q. In other words, when Etribou told you that there were only two collection letters outstanding, aggregating \$165,000—one for \$113,000 and the other for \$52,000—you inferred that the \$89,000 was entered on its books, did you not,—the Bank of America?

A. I assumed that it had been. [237]

Q. Yes. And that was the difference, in your opinion, between the four checks and the six checks. The four checks, the credit for the four checks had been entered on the books of the Bank of America, whereas on November 17th, the credit for the six checks had not been entered. Is that the difference?

A. That is what I assumed. That is the difference.

Q. Yes. All right. Now in testifying with respect to Defendant's Exhibit H, you said it was an internal document kept by the Merchandise Bank for the purpose of keeping track of its transactions with the Bank of America, is that right?

A. Yes, sir.

(Testimony of Frederick C. Messenger.)

Q. It was kept in the ordinary course of business, was it not? A. Yes, sir.

Q. And it was kept for the purpose of showing how much the Bank of America owed you and how much you owed—that is, how much the Bank of America owed the Merchandise Bank and how much the Merchandise Bank owed the Bank of America, was it not? A. No, sir.

Q. What's that? No, sir.

Q. Well, for what purpose was it kept, then?

A. It was an account that we maintained at the Merchandise Bank that represented the balance which the Bank of America owed to us.

Q. And it showed the balance which the Bank of—and it was [238] kept for the purpose of showing the balance which the Bank of America owed you, is that right? A. That is correct.

Q. And therefore you entered on that ledger the amount of debits in your favor and the amount of credits in favor of the Bank of America, did you not? A. That's right.

Mr. Erskine: I think that's all, your Honor. Yes, that is all.

Mr. Lasky: No further questions here.

Mr. Erskine: Oh, pardon me. One second.

Q. I think you testified, Mr. Messenger, that the six checks were not turned over to the Bank of America—I mean, to the trustee in bankruptcy of the United Produce Company, or the United Produce Company itself. That's correct, is it not?

A. That's right.

(Testimony of Frederick C. Messenger.)

Q. As a matter of fact, you sent the six checks to the Bank of America with a letter here that is dated November the 19th, 1948, and has been introduced in evidence as Defendant's Exhibit D (handing to witness).

A. The checks were sent to the Bank of America, East Bakersfield, with that letter.

Q. And you received those checks back, did you not, with a letter from the Bank of America, a copy of which I now show you? [239]

Mr. Lasky: Well, now, of course if that goes in, then we have got to put in that stipulation the checks came back again, and I thought we were going to eliminate all that as unnecessary tomfoolery.

Mr. Erskine: Well, that's right, except you asked what was done with the six checks, and I want to show that this letter in response to the letter you have already introduced in evidence—

Mr. Lasky: Well, the fact we didn't give it to the United Produce Company doesn't mean we have got to go through all this rigmarole of the checks going back and forth between the two banks.

Mr. Erskine: I want to show what happens to the six checks. You said they were not given to the United Produce.

The Court: Well, I thought you were stipulating as to what happened to the six checks.

Mr. Lasky: I thought we had.

Mr. Erskine: I don't think the letter is covered by the stipulation, but if it will be covered, I will

(Testimony of Frederick C. Messenger.)

stop talking about it. I will withdraw it and I will try to put it in my stipulation.

The Court: I don't think it makes any difference. The checks were sent back and then back again—that is, were sent from the Merchandise Bank to the Bank of America, from the Bank of America back to the Merchandise,— [240]

Mr. Erskine: That's right.

The Court: —and eventually back into the Bank of America again. Now those are the facts of the case.

Mr. Erskine: That's right.

Mr. Lasky: Correct.

The Court: What difference does it make what letter accompanied them? Does it have any bearing on any of the issues?

Mr. Erskine: Well, except, your Honor, that this letter says that the return of these checks was agreed upon by our head office—that is, the Letter of November 19th, which has been introduced in evidence as Defendant's Exhibit D. And the letter that I am now offering, which is a letter from Etribou to Messenger, says, "We cannot accept the return of these checks, as there has been no agreement for their return with this bank."

The Court: Oh, what difference does it make? That means they are all just kind of feeling their way around to find out what the legal effects of all their transactions are; isn't that what happened?

Mr. Erskine: That's right. They are both self-

(Testimony of Frederick C. Messenger.)
serving papers. Well, as long as one is in, I would like to have the other.

The Court: Well, you can put them both in; but it doesn't make any difference. Both of them could go out, as far as that [241] is concerned.

Mr. Lasky: Well, some of the cases seem to put some significance in the fact that the receiving bank or collecting bank had not turned over the paper, the checks, to the party from whom the funds were to be collected, but sends it back to the forwarding bank. Some of the cases attach some significance to that.

The Court: Well, that is stipulated to already, the facts concerning that.

Mr. Lasky: And certainly I would make no contention that the letter, in returning these checks, was evidence of any agreement binding upon the Bank of America, if there was an agreement.

Mr. Erskine: Well, apropos, I would like to have—

The Court: By way of your stipulation, you have already stipulated to the facts. Why don't you withdraw that exhibit, then, if that is bothering you, the first covering letter?

Mr. Erskine: Well, the exhibit has a bearing on my cross-examination of Mr. Messenger.

The Court: Well, all right, put the other one in, then. Let's get on with the matter. I don't see that the letter will help us.

The Clerk: Defendant's Exhibit L.

(Testimony of Frederick C. Messenger.)

(Whereupon covering letter referred to above was received in evidence and marked Defendant's Exhibit L.) [242]

Mr. Erskine: And in view of the statement just made by Mr. Lasky, I would like to ask one more question, Mr. Messenger. Mr. Lasky, as I understood his statement, said that there was some authority that said that the disposition of the checks had some bearing upon the decision of the legal issues which may be decided in this matter. Therefore I will ask Mr. Messenger this:

Q. On November the 17th and 18th, Mr. Messenger, the Merchandise Bank and you, as an officer of the Merchandise Bank, knew that you were going to take a substantial loss arising out of your transactions with the United Produce Company, did you not? A. Yes, we did.

Q. And you were doing whatever you could to minimize that loss on those dates, is that right?

A. That's right.

Mr. Erskine: That is all.

Mr. Lasky: No further questions.

The Court: Very well, call the next witness.

Mr. Lasky: Well, now, at this time, if the Court please, I think we ought to get into this stipulation that we worked up last Friday in an orderly fashion. Now I gave you a written copy this morning, so we have read it before, the Court has read it. I see no reason for reading it now.

The Court: No.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: Except that I have not re-read the copy of it, [243] your Honor—the new, clean copy that you handed to me this morning. I just haven't had a chance to read it. I will read it this evening.

The Court: Well, let's take a 15-minute recess, and you can read it, and it will be done.

Mr. Erskine: All right.

The Court: The Court will stand in recess until 4 o'clock.

(Recess.) [243-A]

(Counsel for the respective parties discussed with the Court off the record a proposed stipulation, after which the following occurred:)

Mr. Lasky: I offer as Exhibit 9 the original deposit tag in the Lofendo account dated November 10, 1948, for \$113,216.50.

The Court: It is admitted in evidence.

(The deposit tag referred to was thereupon received in evidence and marked Defendant's Exhibit 9.)

Mr. Lasky: There was a reference here to the Collection Letter, which was put in as a Plaintiff's Exhibit, but I believe Mr. Erskine got it in as a Defendant's Exhibit in the last half hour. I will put in the Defendant's Exhibit number if you tell me what it is.

Mr. Erskine: That is the Collection Letter.

Mr. Lasky: The original Collection Letter.

The Clerk: That is Defendant's Exhibit G.

The Court: That has already been admitted in evidence.

Mr. Lasky: The next one is a letter of November 18, 1948, from Mr. LeRoy to the Bank of America, being the letter written in the Bank of America's offices. That is to go in as Plaintiff's Exhibit 10.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 10.)

Mr. Lasky: If the Court please, because there is going to be testimony around this, I would like you to indulge me permit [244] me to read a passage from it. If I may do so:

"A Collection Letter of the East Bakersfield Branch (No. 419) of the Bank of America N. T. & S. A., No. C-419-4768, containing the following checks of the United Produce Company, endorsed 'Frank C. Lofendo,' and then there is a list of six checks and I do not need to read them. The numbers, "totaling a \$113,-216.50 was received by us on November 15, 1948, and, in error, and advice of credit for the items was mailed on November 16, 1948. The items numerated above totaling \$113,216.50 are not being accepted by us and will be returned to the East Bakersfield Branch (No. 419) of the Bank of America N. T. & S. A., and this letter will serve as your authority to return credit advice which was sent to you in error

and which has not yet been received by your East Bakersfield Branch, without action."

Mr. Erskine: Will you pardon me one second? The date in the letter, November 16, as the date of mailing the advice, is incorrect.

Mr. Lasky: It seems to be incorrect, but we stipulated to the date of mailing.

Mr. Erskine: Therefore I want it understood that when I stipulate to the letter, I am not stipulating to that statement in it.

Mr. Lasky: You are not stipulating to anything in the letter, that is true. You are merely stipulating that the letter was written. [245]

The Court: Yes.

Mr. Lasky: The next Exhibit is a letter dated November 18, from the Bank of America, from Banks and Bankers department, San Francisco Headquarters, by Mr. Roland T. Duncan, Assistant Vice President, over his signature, to Mr. F. E. Etribou, Manager, East Bakersfield Branch (No. 419), Bakersfield, California, and that goes in as Plaintiff's Exhibit No. 11.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Erskine: That is correct what Mr. Lasky said; I am not, of course, stipulating to any of the facts in the letter, just the fact that the letter is written, that is all. I should say any of the statements, not facts.

Mr. Lasky: That is true of any document. We stipulate it is a document but not to its contents.

Mr. Erskine: I do not know. The contents of some of these documents is stipulated to, isn't that right?

The Court: The documents speak for themselves in any event.

Mr. Erskine: Yes, what is in the documents.

Mr. Lasky: I do not think there is any misunderstanding on this. I would like to read this letter which is short addressed to Mr. Etribou:

“Dear Mr. Etribou:

“This is to confirm our various telephone conversations of today. I am enclosing a signed copy of a letter given [246] to us today by Mr. A. R. LeRoy, Vice President of the Merchandise National Bank, Chicago, Illinois. The original we are maintaining for our files.”

Now, Mr. Erskine, we have stipulated that the letter last placed in evidence is the original.

Mr. Erskine: That is right.

Mr. Lasky: “I believe you will find the letter to be self-explanatory.

“During your telephone conversation this afternoon with Kenneth M. Johnson, Assistant Counsel of our Legal Department, you were informed of our bank's position in this case, namely, we must recognize their instructions.

“Mr. LeRoy will have called on you tomorrow before you receive this letter. From what he told me today, it does not look too encourag-

ing for them and any assistance you are able to give him will certainly be appreciated.

"Every indication points to your office coming out O.K., and from what you said, my hat's off to you. For your information, I just finished talking to our Fresno Office and everything appears to be in the clear there also.

"Regards.

"Sincerely,

"ROLAND T. DUNCAN,

"Assistant Vice President."

Now, in the margin opposite the words "we must recognize their instructions," there is a pencil arrow pointing to those [247] words, and then in the margin is handwriting in pencil: "Like hell I will," initialed N.B. Will you stipulate that Mr. Etribou wrote that on there sometime in the afternoon of November 19?

Mr. Erskine: I do not know whether it was the afternoon, but he wrote it on there. He received the letter at 2:15 in the afternoon, and so he wrote it sometime after that.

Mr. Lasky: After that. The next exhibit is a memorandum dated October 22, 1948, by I. N. Tarr, Assistant Cashier-Chief Clerk, East Bakersfield, letters so marked as Plaintiff's Exhibit 12.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 12.)

Mr. Lasky: This is short and I would like to read it also:

“Subject: United Produce Co. and Frank C. Lofendo

“It has been brought to my attention of unusual operations between the two subject parties. Frank Lofendo, who has an account at this Branch, has been making deposits consisting of checks drawn by United Produce Company on Merchandise National Bank, Chicago, Illinois. The amounts have been averaging medium five figures and seem to be gradually increasing. Upon checking the canceled checks of Mr. Lofendo, we find that the majority of checks in medium five figures are made payable to the United Produce Company.

“A few days ago, I wired Merchandise National Bank asking for the financial responsibility and the top limit for acceptance of [248] checks on the United Produce Company. Their response was that they loaned them legal limit on secured basis. Net worth of the Company was over \$80,000.00 and that they could not set a limit on acceptance of checks and suggested that we contact our Fresno Main Office, who have complete information on the Company. Mr. Nelson of Fresno Main Office has been contacted and the information that he gave us was no more than what was contained in our wire response.

“This has been taken up with Mr. Etribou, Manager, and he has given instructions that we do not accept these checks for immediate credit until such time as Mr. Lofendo can be con-

tacted and his method of operation discussed.

"At the present time Mr. Lofendo is in Chicago and is expected to return in about two weeks.

"I. N. TARR,

"Assistant Cashier-Chief
Clerk."

initialed by Mr. Etribou, by Cosgrove, and by two other gentlemen whom I assume you will stipulate were officers of the Branch.

Mr. Erskine: Yes. I do not know their names.

Mr. Lasky: Their identity is not important. They were four officers of the Branch, including Manager Etribou and the Assistant Manager, Mr. Cosgrove.

The next in evidence is a memorandum from the East Bakersfield Branch, which is even shorter, dated November 15, 1948, and it is to go in as Plaintiff's Exhibit 13.

(The document referred to was thereupon received in evidence [249] and marked Plaintiff's Exhibit 13.)

Mr. Lasky: I would like to read this:

"East Bakersfield, Nov. 15, 1948.

"Subject: Frank C. Lofendo

"This is in further reference to the activities and operations of the account of Frank C. Lofendo. Shortly after the last memorandum, Mr. Lofendo flew from Chicago with the President of United Produce Company. The matter of his deposits and checks drawn against his

account was discussed with Joseph V. Cosgrove, Assistant Manager.

"It was my understanding, as a result of this conversation, that it had been agreed that he, Mr. Lofendo, would not draw against his deposits until such time as the items would be cleared. Also, he would endeavor to increase the balance of his account. The account at present appears to be used as a clearance account between United Produce Company and himself. Mr. Cosgrove was apparently satisfied with this arrangement.

"This matter was again re-discussed at our Officers' meeting on Wednesday, November 10th, and at that time, Mr. Etribou insisted that all items deposited should be cleared before credit is allowed.

"Upon complying with this request, it has been necessary to return many checks for the reason 'drawn against uncollected funds.' As a result, we have had many long distance calls from Chicago, Philadelphia and San Francisco concerning these. [250]

"I. N. TARR,

"Assistant Cashier-Chief
Clerk."

initiated by Mr. Etribou and by three other officers of the Branch. Correct?

Mr. Erskine: That is right.

The Court: You are filling in those numbers on the stipulation?

Mr. Lasky: I have been writing them in. I suggest that this stipulation, which we deem signed, perhaps should be given a number to identify it or transposed into the record to become evidence in the case?

The Court: Yes, it might be better to give it a number and accept it in evidence as the stipulation of the parties.

(The stipulation referred to was thereupon received in evidence and marked Plaintiff's Exhibit 14.)

Mr. Lasky: Mr. Erskine, I assume the other stipulations we discussed this morning you are not prepared to act on?

Mr. Erskine: No, I have not been able to check them yet.

Mr. Lasky: If your Honor wishes me to call a witness, I will do so.

Mr. Erskine: May I say this, I have to try to prepare that stipulation we discussed this morning, and I told the stenographer I would be at the office to start dictating it. It is a rather difficult document. In addition to that I have been suffering with sinus trouble; I cannot do much night work.

The Court: The Court will adjourn until 10:00 o'clock [251] tomorrow morning. [251-A]

June 20, 1950—10:00 A.M.

The Clerk: Merchandise National Bank vs. Bank of America on trial.

Mr. Lasky: I would like to inquire of counsel,

before we proceed with any further witness, whether we can get clear the further stipulations we were discussing yesterday morning. I would like to get them in evidence.

Mr. Erskine: There was the Lofendo and the Gassman—

Mr. Lasky: And then there was the further one.

Mr. Erskine: There is going to be a little change here.

Mr. Lasky: You were to give me a revision of a paragraph or two.

Mr. Erskine: I have not done that yet. I was extremely busy getting out that other stipulation. I dictated it quite late yesterday evening and I did not have a chance—you know, the one, the dictation of which I was to undertake?

The Court: How about the Gassman and the Lofendo?

Mr. Erskine: I did not check those myself yet. I was working out what I have just stated and other phases of the case, but I asked Mr. Tobey to check them and he seems to think they are all right. I know they seem to be all right with me, and I know we will have no trouble about them, but I should have an answer tomorrow morning on those, on all of them.

The Court: I was hoping we would be through with the [252] Plaintiff's case by tomorrow morning. Can you proceed?

Mr. Lasky: Yes, I can proceed.

The Court: Let us proceed.

Mr. Lasky: Mr. Etribou, will you take the witness stand?

The Court: You know, even with your fine efforts shortening this trial, it looks to me like it is drawing on, and as I told you sometime ago, I am faced with the Judicial Conference that is scheduled here for next week and then I am faced with the desire to go home after that. If there is any doubt in your minds at all as to whether we will finish the case this week, I think that I will start calling Court at 9:00 o'clock in the morning, and we will work later on in the afternoons.

Mr. Lasky: I would think it would be desirable to do so, because while I do not think I have much more—and in fact to date I have spent only about an hour and a half in the whole trial interrogating witnesses—

The Court: Yes.

Mr. Lasky: —still I do not know how long the cross-examination will take, and I would be prepared to come earlier or work later, because these things have a habit of drawing out beyond what we anticipated.

The Court: Yes.

Mr. Erskine: That would be all right with me. I am not as vigorous a man as my friend here.

The Court: I think we could spend five or six hours a day. [353]

Mr. Lasky: I might say as a result of our discussion in chambers yesterday, I touched upon a point and I dropped it at the time, and on further thought I drafted a proposed stipulation that I

thought would get something out of the way, and at sometime during the day I think we might treat that, too.

FRANK ESTRIBOU

previously called as a witness on behalf of the Plaintiff under Rule 43(c), having been previously sworn, testified as follows:

Direct Examination

By Mr. Lasky:

Q. Mr. Etribou, just preliminarily, you are the Manager of the East Bakersfield Branch of the Bank of America? A. That is correct.

Q. Mr. Etribou, on November 17, 1948, you recall you had a telephone conversation with Mr. Messenger? A. I did.

Q. In that telephone conversation it is a fact that Mr. Messenger asked about the Lofendo Account? A. That is correct.

Q. And the two of you over the telephone compared a list of checks and items that had cleared through your Bank?

A. That is also correct.

Q. In that telephone conversation he sounded to you as if he was excited and in trouble, is that correct? [254] A. Correct.

Q. And you knew there was something wrong?

A. I had an idea from his conversations there must have been something wrong on his end.

Q. And he did in that telephone conversation tell you that he was rescinding the advice of Credit for the \$113,216.50? A. He requested that I do so.

(Testimony of Frank Etribou.)

Q. Did he not tell you that he was doing so?

A. No.

Q. Now, on November 18, the next day, you had a telephone call from Mr. Duncan at the Headquarters Office? A. That is correct.

Q. You also had one from Mr. Kenneth Johnson of the legal department of your head office in San Francisco? A. Yes. [255]

Q. Now, on November 18th, the next day, you had a telephone call from Mr. Duncan at the headquarters office? A. That is correct.

Q. You also had one from Mr. Kenneth Johnson of the legal department of your head office in San Francisco? A. That is also correct.

Q. And in those two phone conversations the six checks totalling \$113,000 were discussed, were they not?

A. Are you referring to both conversations?

Q. Yes, both conversations.

A. Yes, but I referred Duncan's call to my chief clerk Tarr, inasmuch as I would have to get the information from him.

Q. Duncan called you earlier in the day and Mr. Johnson called you later in the day?

A. I can't recall the exact time but I did have such conversations.

Q. It is a fact, is it not, that when Mr. Kenneth Johnson telephoned you during the course of the day on November 18th that he told you that Mr. Duncan and Mr. LeRoy of the Merchandise National Bank were at his desk, that they had dis-

(Testimony of Frank Etribou.)

cussed the \$113,000 in checks, and Mr. LeRoy had said that the advice of credit had been sent out in error and that the checks had not been paid?

A. I think that is correct.

Q. Mr. Duncan also said to you that Mr. LeRoy had informed him that Mr. Messenger had told that to you in the telephone conversation [256] the day before?

A. Well, we discussed it in detail. I don't know whether he told me it was an error, but I think he did.

Q. The particular question I asked of you was this, that Mr. Duncan did say to you that he understood from Mr. LeRoy that on the day before Mr. Messenger had told you that in the telephone conversation, namely, that Mr. Messenger had told you that the advice of credit had been sent out in error and that the checks had not been paid?

A. I think that is correct.

Q. Now, Mr. Johnson also told you in that telephone conversation that Mr. LeRoy on that day, November 18th, had rescinded the advice of credit, and Mr. Johnson told you that you were to honor the rescission?

A. I think that is what the letter said, yes.

Q. Of course his letter said that, but he also said that in the phone conversation?

A. I think that is what he said, thought we ought to go along with him, or words to that effect.

Q. You did not receive the letter, of course, until the next day? A. That is correct.

(Testimony of Frank Etribou.)

Q. Mr. Johnson also told you it was the position of the head office of the Bank of America that you were to follow Mr. LeRoy's instructions and return the advice of credit? He told you that [257] that was the position of the head office?

A. I think he requested that I do so.

Q. Yes, and he further told you that that was the position of the head office, did he not?

A. That is pretty hard to remember that.

Q. Perhaps your memory is not so good as it was at the time of your deposition, so I call your attention to page 115, the top of 116:

"A. He said he would like to have me do it.

"Q. It says here—all right. That is what he advised you? A. Yes.

"Q. That was the position of the head office—"

Mr. Erskine: What are you reading?

Mr. Lasky: I am sorry. The top of page 116. I will read it over again.

"A. He said he would like to have me do it.

"Q. It says here—all right. That is what he advised you? A. Yes.

"Q. That was the position of the head office. A. That is right."

Q. That is correct, is it not?

A. If I so testified, that is it, yes.

Q. And, of course, at that time the \$113,000 had not yet been [258] credited to Lofendo's account. This is on the 18th we are talking about.

(Testimony of Frank Etribou.)

A. That is correct.

Q. Now, on the 19th, the next day, Mr. LeRoy called on you at the East Bakersfield branch, did he not?

A. I believe it was the following day, yes.

Q. When he called on you he arrived about 2:30 or thereabouts in the afternoon?

A. After the bank was closed.

Q. Much later in the day?

A. Oh, I would say around four o'clock.

Q. That late on the 19th?

A. I think so. The bank was closed. I still had a couple of customers at my desk. I remember distinctly.

Q. Mr. LeRoy told you at that time, did he not, when he arrived at the branch that he wanted to discuss the \$113,000 matter with you.

A. He said he wanted to discuss the Lofendo case, yes.

Q. You refused to talk to him about it?

A. I told him there wasn't anything to talk about so far as I was concerned.

Q. You declined to talk to him about it?

A. That is correct.

Q. Furthermore, you told him you did not know any reason why you should discuss the matter with him since he had been up in [259] San Francisco and had discussed it with your head office?

A. That is right.

Q. You told him that? A. That is right.

Q. At that time, when you told him that, you

(Testimony of Frank Etribou.)

had already received that letter that Mr. Duncan wrote you, marked Plaintiff's Exhibit 11 in this case, which I show you?

A. It was received November 19th about two o'clock.

Q. So that if you talked to Mr. LeRoy later in the day, you had already received this letter when LeRoy arrived?

A. That is right, if he arrived on the 19th.

Q. He arrived on the 19th. That is a fact, is it not, he arrived the day after you had the phone call with Mr. Duncan?

A. I think that is correct.

Q. And Mr. Johnson. So that at the time Mr. LeRoy called at your office, you already knew that the head office in writing had instructed you to follow Mr. LeRoy's instructions about the advice of credit, is that right.

A. That is right.

Q. And yet you told Mr. LeRoy that the reason you would not talk to him was there wasn't any point to it because he had already discussed the thing in San Francisco, is that right?

A. That is right.

Q. You meant by that, I assume, that whatever San Francisco had said on the subject was it? [260]

A. No, I wouldn't mean that.

Q. What did you mean by it?

A. Just exactly what I said. [260A]

Q. Well, can you explain further to me what

(Testimony of Frank Etribou.)

you meant by telling him that there was no point in talking to him, since he had been talking to San Francisco?

A. He had already seen fit to discuss the affairs of my branch with my head office.

Q. And you didn't tell him at that time that you were not going to follow the instructions of your head office, did you? A. No, I didn't.

Q. Well, now, how long after Mr. LeRoy arrived in your branch did you telephone to Mr. Schilling?

A. I didn't telephone to him.

Q. Did he telephone to you?

A. That is correct.

Q. And when was it he telephoned to you?

A. That would be pretty hard to remember. It was prior to that time—I think he was in the bank at the time.

Q. Well, now, let's identify Mr. Schilling. He was in the legal department of your bank at the headquarters, I mean, by "your bank" the Bank of America? A. That is correct.

Q. And he is also vice president of the Bank of America? A. I think that is his title.

Q. Yes. Now what time of the day was it that he telephoned with relation to the time that Mr. LeRoy came there, either before or after? [261]

A. LeRoy was in the bank at the time. I didn't know the gentleman, but I assumed that is who it was.

Q. I see. So Mr. LeRoy was in the bank, you hadn't yet talked to him and he was standing there

(Testimony of Frank Etribou.)

waiting while you were having a phone call with Mr. Schilling?

A. He was pacing up and down the lobby.

Q. While you were talking to Mr. Schilling, is that right?

A. Well, the phone call came while he was in the lobby, yes.

Q. Yes. And before you talked to Mr. LeRoy?

A. That is correct.

Q. And you say Mr. Schilling put through that call to you? A. That is correct, yes.

Q. And did Mr. Schilling in that telephone call tell you that because of the wire from the Continental Illinois National Bank which had been referred to in this case, which had arrived the evening before, you were not to talk to Mr. LeRoy?

A. You generally follow your attorney's instructions.

Q. But is that what he told you?

Mr. Erskine: What was that? May I have that read?

(Record read.)

Mr. Lasky: Of course the answer is not responsive.

Q. Did Mr. Schilling so tell you that?

A. Well, he didn't mention anything about a wire; he told me not to discuss the case with him.

Q. And did Mr. Schilling in that conversation tell you that [262] you were to—that they were going to charge Merchandise Bank's account in

(Testimony of Frank Etribou.)

San Francisco with \$113,000 and that you were to pass credit to the Lofendo account?

A. I told him I had done so.

Q. You told him that you had done so?

A. That is correct.

Q. And what time of the day on the 19th had you done that?

A. Well, the advice of charge, I think, will indicate the time that we received the advice, and it was made shortly after that, maybe 15 or 20 minutes.

Q. The advice charge?

A. The advice of credit.

Q. Well, now, we have stipulated that the advice of credit arrived at your office in Bakersfield on the morning of the 19th. Do you mean to say that as soon as it arrived, you put through a debit—rather, a credit to the Lofendo account?

A. I made a debit and incidentally credited the account. I didn't make it—I instructed my chief clerk to do so.

Q. At that time when you did that, you had already heard from Mr. Johnson the day before that you were to follow Mr. LeRoy's instructions and return the advice of credit, is that right?

A. He didn't say anything about returning it.

Q. Well—

A. Said he thought we should go along with them and rescind [263] the credit.

Q. Well, then, when the letter arrived—

Mr. Lasky: Will your Honor let me have that letter, please? Thank you.

(Testimony of Frank Etribou.)

Q. (Continuing): When the letter arrived, how soon after it arrived did you write in the margin here these words, "Like hell I will"?

A. Well, that would be more or less of a guess.

Mr. Erskine: What was that last answer?

(Record read.)

Q. (By Mr. Lasky): You mean to say, however, Mr. Etribou, that you were already ignoring these instructions, and yet when the letter arrived you put that statement in the future tense?

A. Oh, I meant just exactly that.

Q. Well, I put it to you, Mr. Etribou, that in fact you had not done anything with the advice of credit until after you talked to Mr. Schilling in the afternoon; now isn't that right?

A. Oh, I had already made up my mind about that.

Q. And when Mr. LeRoy arrived there late in the afternoon, you refused to talk to him, but you didn't tell him that you had already put the advice of credit through and acted upon it?

A. I didn't tell him that, no.

Q. I see. Now when you talked to Messenger on the 17th, Mr. Messenger on the 17th, you had learned from his telephone conversation, of course, that the advice of credit had been sent out? [264]

A. That is correct.

Q. Although you hadn't yet received it?

A. He asked me if I had received it.

Q. You hadn't?

(Testimony of Frank Etribou.)

A. I told him that I didn't know, because it was late in the afternoon and had he sent it out on the 15th, it should have been in our office on the 17th—had it been properly directed.

Q. But in fact, of course, you hadn't yet gotten it? A. No, I didn't know that at the time.

Q. Now you deduced from what he said that an advice of credit had been sent out, that on the day when it was sent out, the 15th of November, as he told you, the Merchandise Bank had also put through the various entries on their own books corresponding to the advice, namely, a charge against the United Produce account and a credit in their own record in the Bank of America's account. You assumed all that, did you not?

A. Our head office was credited for us, yes.

Q. And you assumed that those things occurred—

Mr. Erskine: Pardon me. I couldn't quite hear. Would you speak a little louder, Mr. Etribou?

(To the Reporter.)

Would you read that back, please?

(Record read.)

Q. (By Mr. Lasky): My question is, you assumed from what Mr. Messenger said that all those things had occurred on the 15th?

A. That's right. [265]

Mr. Erskine: All what things, counsel?

Mr. Lasky: The entry of an item in the United Produce Company's account on the books of the

(Testimony of Frank Etribou.)

plaintiff, and an entry in the ledger sheet of the Bank of America on Merchandise's books.

Q. You understood the question, did you not, Mr. Etribou? A. Yes, I did.

Q. How does it happen, then, that at that time you did not then put through an entry to the credit of Lofendo and request San Francisco to charge Merchandise's account?

A. Well, that isn't the procedure that is followed.

Q. What is the procedure that is followed?

A. Generally wait until you receive the advice of credit.

Q. And that is true in case of any item that has gone out from your bank on a collection letter, is it not?

A. No, unless you have telegraphic advice.

Q. Well, on your collection letter you will state whether or not you want telegraphic advice?

A. That is correct.

Q. You had not so requested in the case of the \$113,000? A. I don't think I did so.

Q. Well, whether you did or not will appear on the face of the collection letter, will it not?

A. I think it is a sticker that appears on the item itself, rather than—— [266]

Q. Well, I show you the collection letter that was sent, so there will be no doubt about it. Defendant's Exhibit G. This did not request advice by wire, but it says "Advise non-payment by mail"; is that right? A. That is correct.

(Testimony of Frank Etribou.)

Q. So that in the case of collection letters, unless you have requested advice by wire, you never enter any credit upon the basis of it or make any entries upon the basis of it until you have received the advice of credit in hand, is that right?

A. I didn't make it in this case.

Mr. Lasky: Will you read that answer, please?

(Record read.)

Q. (By Mr. Lasky): The question is, you never make such entries on a collection until you have got the advice of credit in hand?

A. I won't say that, because we might have a phone call advising us to pay. Naturally I would make the entry then.

Q. Well, now, in this case on November 17th you had a phone call advising you that the advice of credit had been sent out and you assumed from that that all the appropriate entries had been made on Merchandise's books? A. That is correct.

Q. Why did you not then enter your entries upon the basis of that?

A. Well, there was no particular reason for making it at that time. [267]

Q. You didn't do it because it isn't the practice to do it until you get the advice of credit in hand; now isn't that right?

A. No, I still do it. We could do it for any reason. Might be a dozen reasons for us doing it other ways.

Q. You also didn't do it because Mr. Messenger told you it was revoked?

(Testimony of Frank Etribou.)

A. He said he would like to have me revoke it, yes.

Q. Well, now, Mr. Etribou—

Mr. Lasky: Mr. Erskine, will you let me have the original of Etribou Exhibit 5-C for identification? And while Mr. Tobey is finding that, I will proceed.

Q. The fact is that it was not the custom or practice of your branch in your dealings with Merchandise National Bank to instruct the head office to charge Merchandise's account until a written authority to do that was in hand received from Merchandise, isn't that a fact?

A. Would you mind reading that again?

Mr. Lasky: Yes, I will be happy to. Would you read that?

(Record read.)

A. We will never pass entry until we have an advice of credit, yes.

Q. Yes, until you get it. And as a rule, you have to have something to support any entry of that sort, and it was always the practice to wait until some written instruction was received from Merchandise on collection items before passing credit to [268] the customer and instructing the head office to charge Merchandise? A. That is correct.

Mr. Lasky: Yes. Now do you have that slip, please?

Q. Now, Mr. Etribou, I show you here a little slip of paper—

(Testimony of Frank Etribou.)

Mr. Lasky: If the Court please, it was marked Plaintiff's Exhibit 5-C for identification on the Etribou deposition, so I assume it is adequately identified for purposes of questioning the witness.

The Court: Very well.

The Clerk: Our mark is on the back of it.

Mr. Lasky: You haven't marked this yet.

The Clerk: Oh.

Q. (By Mr. Lasky): I show you here a little slip of paper purporting to be a deposit tag, all typed out, "Frank C. Lofendo," dated "11/19/48," for \$113,216.50, "proceeds of Collection No. 419.-476," with a stamp on it.

Mr. Lasky: The Court might wish to glance at that slip first (document examined by Court).

Q. (Continuing): Now, Mr. Etribou, looking at that paper, this little slip was prepared in your branch, wasn't it?

A. I will take a look at it (examining). Yes, it was made out by one of our collection tellers.

Q. Yes, and it was made out on the 19th, wasn't it? [269]

A. That is the date on there, yes.

Q. And what time of the 19th?

A. Oh, I couldn't tell you that.

Q. Well, now, is it customary on collection items to prepare a brand new deposit tag in order to enter a paid entry?

A. If they have some sort of a credit.

Q. Quite true. And isn't the usual thing to take

(Testimony of Frank Etribou.)

the deposit tag that has come in from the customer when the item came into the bank and use it?

A. Not necessarily.

Q. Isn't it the usual thing? I didn't ask you whether it was necessary. Isn't that your usual practice?

A. If it comes in for collection, as a rule you don't have a deposit tag.

Q. Well, you always did it in the Lofendo matters, did you not?

A. They were treated, they attempted to treat them as cash, yes.

Q. Well, I didn't ask you that. I have asked you a physical question.

A. I couldn't answer that, because I don't handle them. I don't handle it.

Q. Well, all right. Now I show you here a little slip that has already been marked in evidence as Plaintiff's Exhibit 9 (handing to witness), a carbon copy, and that has been stipulated — [270]

Mr. Lasky: —to by Mr. Erskine, has it not, Mr. Erskine, as No. 9, to be a carbon copy that came in with the \$113,000 when it first came into the bank?

Mr. Erskine: Let me see it, will you?

Mr. Lasky: If it hasn't been so stipulated, I will ask you to, because it is so shown by the depositions. Comes from your records.

Mr. Erskine: I don't know as I stipulated to it.

Mr. Lasky: Then I request you to do so.

Mr. Erskine: That it is a carbon copy?

(Testimony of Frank Etribou.)

Mr. Lasky: It is the duplicate, of the deposit tag that came in through the mail to Bank of America when the \$113,000 came in on the 13th day of November.

Mr. Erskine: Yes, all right, that is stipulated to.

Mr. Lasky: All right.

Q. Now, Mr. Etribou, your bank had in its possession on November 19th this deposit tag which is marked Plaintiff's Exhibit 9, dated November 10th. How does it happen that it was not that ticket that was used as the basis of your entry instead of your branch preparing a brand new one?

A. I still can't answer that, because I had nothing to do with passing the entry.

Q. Well, I ask you if this isn't a fact, that the original of the deposit tag of which Plaintiff's Exhibit 9 is a carbon copy was, on the 18th, after your conversation with Mr. Johnson, [271] stamped as unpaid and returned rejected, and then destroyed the next day? A. I couldn't answer that.

Q. You know nothing about it?

A. I don't know. I don't handle items of that kind. That isn't part of my duties.

Mr. Lasky: All right, I ask that the document marked Plaintiff's 5-C for identification on the Etribou deposition be marked as Plaintiff's exhibit next in order.

The Court: Very well.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(Testimony of Frank Etribou.)

(Whereupon the deposit tag previously marked Etribou 5-C, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 15.)

Q. (By Mr. Lasky): Now when you had your telephone conversation with Mr. Schilling on the 19th, in the afternoon, did you tell Schilling that you intended to pass entry on the books of \$113,000?

A. No, I think I told him that I had already passed it, and I was going to stand on it.

Q. All right, I call your attention to your deposition, beginning on page 103, line 22:

"A. I think I put in a call myself to Schilling.

"Q. Was that while LeRoy was there or before?

"A. It was before." [272]

Now was it before or while Mr. LeRoy was in the lobby?

A. Oh, it was before, because the entry was made prior to, before 3 o'clock.

Q. I am not asking you about the entry.

Mr. Lasky: I move that go out.

A. All right, what is your question, then?

Q. I am asking you whether the phone call was put to Mr. Schilling, before LeRoy arrived, as you say, in the deposition, or while he was in the lobby as you said a few moments ago?

A. It was before.

(Testimony of Frank Etribou.)

Q. But it was still going on while he was in the lobby? A. That is not the case.

Q. Well, did you not testify only a few moments ago that Mr. LeRoy was in the lobby while you were talking to Mr. Schilling?

A. But it was Schilling's phone call.

Q. It was Schilling's phone call?

A. That's correct.

Q. Oh, had you two phone calls with Mr. Schilling that day?

A. I assume that that is the case, yes; pretty hard to remember that far back.

Q. Well, how early in the day had you called Mr. Schilling?

A. It was prior to that time. I am certain of that.

Q. You called him early in the morning?

A. Might have been any time.

The Court: Let me get this straight, now. Were there [273] two telephone calls between you and Mr. Schilling on that day?

A. Your Honor, there were so many phone calls, it is pretty hard to remember all of them.

Q. Well, are you testifying as to whether there are two or one? How many?

A. I know that there was more than one phone call with Schilling.

The Court: All right.

Q. (By Mr. Lasky): Well, now, Mr. Etribou, I will continue with this deposition:

"Q. What did Mr. Schilling tell you?"

"A. Oh, I just discussed it."

(Testimony of Frank Etribou.)

And then continuing on page 104, line 10, Mr. Erskine:

"I merely asked him about my position and told him what I intended doing."

"Q. You told Mr. Schilling?"

"A. Regardless of what had taken place."

"Q. And what did you tell him you intended to do?"

"A. Pass the entry on my books."

Now is that correct? Did that happen?

A. That was the first phone call; that was my phone call to him.

Q. And how early in the day was it?

A. That I couldn't tell you. I know it was before the bank closed, shortly after receiving the advice of credit. [274]

Q. And then I understand you to say that when Mr. LeRoy was there, you got a phone call from Mr. Schilling in which you discussed the same thing over again?

A. No, I didn't. He asked if Mr. LeRoy had called on me as yet, and I told him no, but there was a gentleman in the lobby and I assumed that he was Mr. LeRoy—which later proved to be him.

Q. Well, now, when you talked to him earlier in the day and you told him you intended to pass the credit, did he tell you then that Mr. LeRoy was coming down? A. No, he didn't tell me that.

Q. Didn't mention that?

A. No; I was calling him.

(Testimony of Frank Etribou.)

Q. And then he called you back later?

A. That's right.

Q. And told you not to talk to LeRoy when he got there? A. That's right.

Q. And in one of your conversations with Mr. Schilling, you told him you intended to pass the credit regardless of what had taken place?

A. That's right.

Q. And what did you refer to by the "regardless of what had taken place"? I will withdraw the question.

By "regardless of what had taken place," you referred to the fact that Mr. Messenger in his phone call with you on the [275] 17th told you the advice was revoked, and you also referred to the conversations between Mr. Duncan and Mr. LeRoy and Mr. Johnson on the 18th, and Mr. Johnson's telephone call to you, in which he told you you were to follow Mr. LeRoy's instructions about the revocation of the advice of credit. Those are the things you referred to, are they not?

A. I referred to any commitments that may have been made by anyone in reference to that particular item.

Q. Yes, any commitment made by anyone on the behalf of the Bank of America with regard to that rescission? A. In behalf of my branch.

Q. Yes. At that time you were aware that such a commitment had been made?

A. From the communications, yes.

Q. And the fact is, Mr. Etribou, what made

(Testimony of Frank Etribou.)

you change your mind, decide to seize advantage of that advice of credit, was the receipt of that wire from the Continental Illinois National Bank late on the 18th, which awoke you to the fact that some one in your branch had violated your instructions and had given immediate credit to the Lofendo account on some other checks. Isn't that right? And that you were suffering the loss as a consequence of that mistake?

A. I determined that, we found out that we had an overdraft in the account, and naturally we passed the entry.

Mr. Lasky: I move to strike out "and naturally we passed [276] the entry."

The Court: Well, it is just an explanation of his answer.

Mr. Lasky: All right, very well.

The Court: As he views it.

Q. (By Mr. Lasky): And the whole purpose of your crediting the Lofendo account with the \$113,000 was to get funds into that account so you could cover up the \$97,000 overdraft?

A. That is one reason.

Q. Now it is a fact—well, I will withdraw my intended question.

I show you here, Mr. Etribou, the document that was marked, that is in evidence as Plaintiff's Exhibit No. 12. This is a memorandum of October 22nd to Mr. Tarr. I want you to look at it so you are familiar with it, before I ask any questions on it.

A. I have seen it.

(Testimony of Frank Etribou.)

Q. You have initialed it?

A. That is correct.

Q. Now on October 22nd, you saw it?

A. I saw that document?

Q. Yes. A. Yes, that's right.

Q. Yes. And when this states in here that "Mr. Etribou has given instructions that we do not accept checks in the Lofendo account for immediate credit until such time as Mr. Lofendo [277] can be contacted and his method of operation discussed," that is the fact on that date; you did so instruct your branch officials? A. That is correct.

Q. And at that time you discussed with your branch officials, with Mr. Tarr—by the way, who is Mr. Tarr?

A. He is our chief clerk and operations officer.

Q. And Mr. Cosgrove is your assistant manager?

A. Assistant manager.

Q. You discussed with them at that time that there were unusual operations going on between United Produce Company and Frank C. Lofendo?

A. It was brought to my attention by Tarr.

Q. Yes? A. First.

Q. Yes. And then you discussed it?

A. That's right.

Q. And it was discussed that checks in large amounts were coming in to the account from United Produce Company and large amounts of checks were going out to the United Produce Company? That was discussed?

(Testimony of Frank Etribou.)

A. I requested they bring the checks to me and I examined and determined that, yes.

Q. And after determining that, seeing that to be the fact, you considered that a most unusual situation? [278]

A. Due to the size of the checks and the activity, yes, it was.

Q. Yes. And now—

Mr. Lasky: Now, at this point I want to make use of some documents which were going to be covered by stipulation, and I assume counsel will permit me to do so even though the stipulation has not yet been approved. I have before me, Mr. Erskine, your S.P.M. 214. I will request you for a stipulation at this time that that is one of the rules and regulations of the Bank of America and was one at the time of this, in November of 1948.

Mr. Erskine: Yes, that is right.

Mr. Lasky: So stipulated. And I will offer it in evidence as Plaintiff's next in order.

The Court: Very well.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(Whereupon document referred to above as S.P.M. 214, Bank of America, was received in evidence and marked Plaintiff's Exhibit No. 16.)

Q. (By Mr. Lasky): Now, Mr. Etribou, you were aware of the fact that in October of 1948 it was a rule of your bank that branch managers are expected to watch their deposit accounts, that de-

(Testimony of Frank Etribou.)

positors must not be permitted to habitually overdraw their account or to use them for kiting and the like transactions, that branch managers should arrange for closing of depositors' accounts when the depositor persists in issuing [279] checks which must be rejected to avoid overdrafts, in kiting, in drawing against uncollected funds or in other practices which are dangerous to the bank. You were acquainted with that rule? A. I am.

Q. And were acquainted with that rule. And with your acquaintance with that rule, you discussed the subject matter on October 22nd with your branch officers and issued the instructions that Lofendo was to be brought in and no checks brought against his account were to be given credit, until collected; is that not right?

A. I think that is correct. [280]

Q. Now, when those facts on October 22, were brought to your attention, to wit, the great number of checks coming into the Lofendo account, the large size of the checks, being in five figures, the fact that a great many checks in five figures were going out, the fact that checks were coming into Lofendo from United Produce Company and going out to United Produce Company from Lofendo, when these facts were called to your attention there, you appraised them in the light of your twenty-five years of experience in banking, did you not?

A. I what?

Q. You appraised these facts? A. Yes.

(Testimony of Frank Etribou.)

Q. And as a consequence you suspected that there was a check kiting operation going on?

A. No, I did not suspect a check kiting operation.

Q. Well, Mr. Etribou, I call your attention to your deposition, page 20, beginning on line 3. Perhaps so the connection will be clear we will start on page 19, line 18. What was there about the facts as you saw them in this memo—and the memo, I guess you will stipulate, Mr. Erskine, I was there referring to was this memo of October 22?

Mr. Erskine: Yes, all right.

“Q. (By Mr. Lasky): What was there about the facts as you saw them in this memo and as they were related to you by Mr. Tarr which had led you to instruct that checks thereafter deposited in [281] the Lofendo account drawn on out-of-town banks were to be received for collection only?

“A. About twenty-five years of experience has taught me that.

“Q. Well, for the benefit of me, who doesn't have that twenty-five years of experience, what circumstances in that experience led you to that?

“A. Well, I tried to explain that to you. The size of the items and the activity in the account.

“Q. Did you suspect that there may be a check kiting operation?

(Testimony of Frank Etribou.)

"A. Well, my action, I think, perhaps would answer that question."

You so testified?

A. Apparently I did.

Q. And that is your answer now?

A. No, I did not suspect a kiting operation. I wanted to say I would rather be safe than sorry.

Mr. Lasky: We will let the language of the testimony speak for itself.

Mr. Erskine: I think, counsel, if you read that part of his testimony, you ought to read his other testimony.

Mr. Lasky: We had the same question the other day. The counsel can read anything he wants to.

The Court: Yes, you can bring that out, counsel. Mr. Lasky does not have to clear up any apparent inconsistencies, that will be up to you.

Mr. Lasky: Now, Mr. Etribou, you are acquainted also with [282] this memorandum dated November 15, which has been marked as Plaintiff's Exhibit 13. Will you look at it to make sure that you do have it in mind? A. Yes, I recall it.

Q. This document you have just referred to, Plaintiff's Exhibit 6, further referred to the activities and operations of the account of Lofendo and refers to the fact that after the last memorandum Lofendo had flown out from Chicago with the President of the United Produce Company, and states, "This matter was again rediscussed at our officers' meeting on Wednesday, November the 10th,

(Testimony of Frank Etribou.)

and at that time Mr. Etribou insisted that all items deposited should be cleared before credit is allowed."

Is it a fact that you did then, on November 10, at an officers' meeting insist that all items deposited in the Lofendo account must be cleared before credits are allowed?

A. The minutes of that meeting I think will indicate that.

Q. Are there minutes of that meeting other than this memorandum? A. Yes.

Mr. Lasky: I asked during the depositions for all documents upon the subject. I thought they had all been supplied. I make the request that if there are such minutes in existence, that they be produced.

Mr. Erskine: I can give you a copy of them.

Mr. Lasky: But meanwhile the witness can answer the question directly. [283]

Q. Did you at that meeting insist that thereafter all items deposited in the Lofendo account should be cleared before credit was allowed?

A. I reiterated my previous instructions, yes.

Q. In other words, that no credit was to be given on any check coming into the Lofendo account until it was actually collected? A. That is correct.

Mr. Lasky: May I have a moment off to look at this document just produced?

The Court: All right.

Mr. Lasky: You have some minutes of November 22, which I do not think we are interested in. It is after the event. It refers to the possibilities of a law suit and the like. May I detach this?

(Testimony of Frank Etribou.)

Mr. Erskine: Yes.

Mr. Lasky: I would like, with the stipulation that those are minutes of the branch of the defendant, to offer it in evidence.

The Court: Any objection?

Mr. Erskine: No objection.

The Court: So stipulated.

(The minutes referred to were thereupon received in evidence and marked Plaintiff's Exhibit 17.)

Mr. Lasky: And it seems short, I would like to read it. [284] The first seems to be an extract of minutes from Wednesday, October 20, which I shall read:

"Tarr, Chief Clerk, stated that he was checking into the financial responsibility of the United Produce Company. Yesterday afternoon he forwarded a wire to Merchandise National Bank of Chicago, Illinois, asking for a statement of financial responsibility of this company and to advise us the top limit of the acceptance of their checks. This matter was brought to his attention upon observation of items being deposited to the account of Frank C. Lofendo. All of his deposits consisting of large checks drawn on the United Produce Company are gradually pyramiding and now amount to around \$100,000. The majority of his own checks are made payable to the United Produce Company. The methods of his operations does

(Testimony of Frank Etribou.)

not seem to be clear. It was suggested he be called in to discuss the matter with us."

And then the meeting of Wednesday, November 10th:

"The matter of Frank C. Lofendo and United Produce Company was rediscussed. Mr. Etribou insisted that all items for deposit should be cleared before credit is received."

Q. Now, Mr. Etribou, at that time you became positive, did you not, that the operations between United Produce Company and Lofendo were not ethical? A. No, he discussed it—

Mr. Erskine: Wait a second. Let him answer the question.

Mr. Lasky: I did not make my question clear as to date. [285]

The Court: Answer it and explain yourself if you wish to.

Mr. Erskine: Answer the question, Mr. Etribou.

The Witness: Lofendo and a representative of the United Produce Company called and discussed their operations with Cosgrove, my Assistant Manager and apparently they satisfied him.

Mr. Lasky: Well—

Mr. Erskine: Wait a second; let him answer the question.

Mr. Lasky: I move to strike out "apparently they satisfied him" as something relating to the

(Testimony of Frank Etribou.)

conversation of other persons. The question was not related to October 20.

The Court: That portion of the answer which is a conclusion of the witness may be stricken.

Q. (By Mr. Lasky): Mr. Etribou, I did not mean to ask you about your state of mind on October 20 or 22nd. At this moment I am asking you about November 10th. Now, November 10th was about 10 days after you understood that Mr. Rosenthal and Lofendo had called at your Branch, is that right? A. I believe that is correct.

Q. You yourself did not talk to Lofendo and Rosenthal? A. I did not.

Q. On November 10th, ten days afterwards, when you made this new insistence that items be taken for collection only, it is a fact, is it not, that you then became positive, if you had not been theretofore so, that the operations between United and Lofendo were not ethical? [286]

A. I was not positive, no. That is what we were trying to determine by having them come in there.

Q. If you were not positive, you felt very strongly about it, that it was not ethical?

A. I still wanted to be safe rather than sorry.

Q. Will you answer my question? You were then on November 10th strongly convinced that the transactions between Lofendo and United Produce Company were not ethical?

A. In so far as I was concerned they were not good business.

Q. Will you answer my question? You were con-

(Testimony of Frank Etribou.)
vinced at that time or felt strongly that they were
not ethical? A. Didn't I answer it?

Q. No, I don't believe you did. You referred to
good business but I haven't asked you about whether
you thought it was good business.

A. It certainly did not satisfy me.

Q. All right, I am going to call your attention,
Mr. Etribou, to page 38 of your deposition, line
7, beginning with line 5:

"And was it then that you became suspicious
of the check kiting operation?

"A. Well, we were almost positive that
something was going on that was not ethical,
to put it that way."

Is that right?

The Witness: Where are you reading from?

Mr. Lasky: I read, counsel, at page 38, begin-
ning at line 5, [287] and I read down to line 10.

Mr. Erskine: Well, now, what date does that
refer to?

Mr. Lasky: I will ask the witness whether he
so testified and if he has something to say about it,
about the date when he became almost positive it
was not ethical. He may tell me what date it was.

Mr. Erskine: I do not think counsel has the
right to ask the witness whether or not on November
10th he became suspicious, at the time of this meet-
ing on November 10th, and then whether or not, as
I understood it—

The Court: He is asking him now if he had not

(Testimony of Frank Etribou.)

made these previous statements in his deposition. You can now fix it as to the time he referred to when he testified on his deposition.

Mr. Erskine: Not the time when he testified on his deposition. My point is, your Honor, was this: Counsel was referring to the date of November 10th, and asked him, as I understood the question, whether or not Mr. Etribou at that time was convinced that there was something unethical going on, on November 10th.

The Court: Yes.

Mr. Erskine: And then he reads something from the deposition which would indicate that Etribou said that he thought something unethical was going on on November 10th. Now, I do not think that is fair. You ought to fix the time that Etribou was referring to.

The Court: When he testified. [288]

Mr. Erskine: Yes.

The Court: Yes, it should be fixed.

Mr. Lasky: We will go back in the deposition. We will start on page 37, line 5:

“Q. Now, Mr. Etribou, Plaintiff’s Exhibit 8, for identification consists of the East Bakersfield Branch Office copy of the wire dated November 13, to Merchandise National Bank of Chicago. A. That is right.

“Q. Together with the translation of the code into ordinary English.”

(Testimony of Frank Etribou.)

And there is some discussion about the translation of the code. May I skip that?

Mr. Erskine: Yes, that is all right.

Mr. Lasky: And then we go to line 23:

"Q. Was this advice by your Branch to the Merchandise National Bank that the first checks received from them drawn on the Lofendo account—— A. Drawn by Lofendo.

"Q. Drawn by Lofendo on the account of your Branch were being returned by your Branch protested because there were no funds to meet them? A. That is right.

"Q. Was it then that you became suspicious of a check kiting operation? [289]

"A. Well, we were almost positive that something was going on that was not ethical.

"Q. All right. A. To put it that way."

Is it a fact on this day, November 13th, you were almost positive that something was going on that was not ethical between Lofendo and United Produce Company?

A. Yes, we suspected that, yes.

Q. This is your testimony, is it not?

A. That is correct, yes.

Q. Did anything happen between November 10th, when you gave positive instructions that Lofendo items were to be taken for collection only, and

(Testimony of Frank Etribou.)

November 13th, to increase your suspicion, or was your frame of mind the same on November 10th as it was three days later?

A. It is pretty hard to answer that question, between the 10th and the 13th. That is a long time ago.

Q. And that is what has just been mentioned a few moments ago about the difference between the three days. Do you suggest that you were less suspicious on the 10th when you gave positive instructions than you were three days later?

A. On the 10th I gave instructions and I guess they carried them out on the 13th if the checks were returned. [290]

Q. Yes, and your state of mind about the unethical quality of the transactions between Lofendo and United Produce was just the same on the 10th as it was three days later, was it not?

A. I think so.

Q. Yes, of course. While you wired Merchandise on November 13th that checks were then rejected, you did not advise Merchandise then or at any other time that you suspected a check hiding operation or that you believed the Lofendo-United Produce transactions were unethical, did you?

A. No.

Q. And, of course, you did not do so in October, at the time of your October 22nd meeting?

A. No, we did not notify them.

Q. You never advised them that you were put-

(Testimony of Frank Etribou.)

ting the Lofendo account on the collection basis only? A. No.

Q. Now, you recall that on November 15th a group of checks totalling over \$52,000 arrived in the mail at your branch for deposit and were sent out for collection only. You recall that?

A. I know we had a group of checks that were sent out for collection.

Q. You recall precisely on the same day another group of checks for over \$97,000 arrived at your branch for deposit and your branch gave immediate credit on them and honored them that day. [291] Do you remember that?

A. I didn't know it at the time.

Q. No, you did not know about it at the time and you did not learn about it until after you got the wire from the Continental Illinois on the night of the 18th? A. That is right.

Q. At which time you were astonished?

A. That is putting it mildly.

Q. Yes, putting it very mildly. How does it happened that your bank on the 15th ignored your previous instructions which you had reiterated with insistence?

A. I am sorry, I did not follow you there.

Q. All right, we will start over. Do you know how it happened on the 15th of November after you had given such positive instructions that Lofendo checks were to be taken for collection only, your bank violated those instructions and gave immediate credit?

(Testimony of Frank Etribou.)

A. It was a mistake; somebody overlooked their hand.

Q. Somebody bungled, is that what you mean?

A. Just overlooked their hand, didn't follow my instructions.

Q. Now, you know a man named Dean Howell, do you not? A. Yes, I do.

Q. At the times things broke in about November 19th, 1948, you called Mr. Dean Howell into your office, did you not?

A. I didn't call him. He was instructed—he called me or I had called him—I don't recall which—and we requested him [292] to drop in to see us.

Q. He did come in about the 19th?

A. I don't know the date but he did come in.

Q. It was on or about that date?

A. I think that is correct.

Mr. Lasky: I think that is all.

The Court: I think this is a good time for a recess.

Mr. Erskine: Before we adjourn, your Honor, I think that the cross-examination of Mr. Lasky bears out the point I was trying to make, that it really is prejudicial to one party to litigation to permit the opposite lawyer to put on a partial story before the whole story has been heard, and the practice of the trial courts in this state, as I understand that practice, seems to be vindicated by what has taken place. I am faced with this quandary. I would like to put on the whole story on my cross-examination. I won't ask leading questions, but I

(Testimony of Frank Etribou.)

would like to have the witness tell the whole story of this account as we understand it, from our point of view, and I just advise the Court and counsel I would like to do that at this time.

The Court: I think it is open for that. The examination has been conducted covering—

Mr. Erskine: The rebuttal and everything else.

The Court: The history of the account has been opened.

Mr. Erskine: I just wanted to mention [293] that.

The Court: I think you are perfectly within your rights to examine the whole Lofendo account and the transactions between Lofendo and the bank.

Mr. Lasky: I would think so, too.

The Court: Very well, the Court will stand in recess until ten minutes after eleven.

(Recess.) [294]

Cross-Examination

By Mr. Erskine:

Q. Now, Mr. Etribou, counsel asked you about certain extracts from your deposition, and I will ask you whether or not it is not a fact that when you gave that deposition to which counsel referred, you also testified as follows:—

Mr. Lasky: Page, please?

Mr. Erskine: Just a second; I am trying to pick it up here. Beginning with line 12 on page 34.

Q. (Continuing.)

(Testimony of Frank Etribou.)

"What was it then, in your state of mind to think the protection of the assets of your bank required you to insist that no credit be given on the Lofendo account on any items until they were actually collected ?

"A. Oh, I stated that half a dozen times in my previous statements. Because of the activity and the size of it. You don't pass credit to an individual because you like the way he combs his hair. He has to have some assets behind him. It is just like granting a loan.

"Q. Did you not then suspect that there was a check kiting operation ?

"A. I would have thrown it out a long time ago if I thought that.

"Q. When did you first suspect a check kiting operation between Lofendo and the United Produce Company ?

"A. What made you think I suspected that? [295]

"Q. Did you never suspect that?

"A. At a later date we did.

"When was that?

"We found out that they had about two or three hundred thousand dollars worth of checks floating around with no funds to meet them.

"When did you find that out?

"Oh, phone calls from various locations throughout the United States.

"At what time?

(Testimony of Frank Etribou.)

"What do you mean, what time?

"When were those phone calls?

"You mean the dates?

"Yes.

"Right after we started bouncing these checks.

"When was that?

"Oh, the records will indicate that.

"Show me the records so I will know what dates you were talking about.

"The return items. When we started warning the various correspondents throughout the United States that several items were being returned then we got calls from Chicago, Philadelphia and various other points."

Did you give that testimony?

Mr. Lasky: Now, if the Court please, reading all this [296] deposition is equivalent, it seems to me, to putting leading questions to the witness. Of course I realize the man has the right, if any passage of the deposition which I have read was inadequate and incomplete, to complete it. But to go on at great length on matters of this kind is the same as leading questions. The witness has said something once before, it would be irrelevant.

Mr. Erskine: That is exactly why I was reading.

The Court: Well, isn't counsel entitled to ask leading questions on cross-examination?

Mr. Lasky: Yes, I would accept that. He is, even though it is his own witness.

(Testimony of Frank Etribou.)

Mr. Erskine: And the other—

The Court: It is not his witness; you called the witness and you are entitled to cross-examine him. That doesn't change the fact that—

Mr. Lasky: That's right, I think that is correct.

The Court: He can cross-examine him.

Mr. Lasky: I was in error there.

Mr. Erskine: And counsel is not right in his other point. He read certain extracts from this deposition—

Mr. Lasky: Well, I realize I was wrong. I withdraw the objection.

The Court: The objection has been withdrawn, counsel.

Q. (By Mr. Erskine): You so testified, did you not? [297] A. I did.

Q. And now, Mr. Etribou, do you remember the first date on which your branch rejected checks drawn by Lofendo on the account?

A. I don't recall the exact date.

Mr. Erskine: Perhaps Mr. Lasky will stipulate that the Bakersfield branch wired to the central office of the Bank of America on November the 12th, rejecting three checks, upon the ground that the checks were drawn against uncollected funds and that on November the 13th the central office wired the Merchandise National Bank to that effect and that the wire was received by the Merchandise National Bank on November the 15th?

Mr. Lasky: Is that the wire which in the

(Testimony of Frank Etribou.)

course of the examination of Mr. Etribou we referred to as having been sent out on the 13th, or is there still another wire that you refer to?

Mr. Erskine: I think that was it. It was the wire from the branch, of November 12th, to the central office. On November 13th the central office wired the Merchandise.

Mr. Lasky: Well, there isn't any doubt that there was a wire sent to Merchandise on the 13th, which was received on the 15th.

Mr. Erskine: Well, I have it.

Mr. Lasky: Respecting the rejection of three checks. I think that has already been covered by earlier testimony and [298] stipulation, but I stipulate again.

The Court: Very well.

Mr. Lasky: Whether it went out from the branch on the 12th, I don't know.

Mr. Erskine: Well, I will ask the Clerk to mark this.

Mr. Lasky: If you have the papers to show it, I will agree to it without question.

Mr. Erskine: Yes. Well, they are right here and I will show it to you.

The Clerk: Defendant's Exhibit M for identification.

(Whereupon telegram referred to above was marked Defendant's Exhibit M for identification only.)

Mr. Lasky (Examining document): Well, these

(Testimony of Frank Etribou.)

papers seem to support that statement, and I will stipulate to it.

Mr. Erskine: All right. The statement is that the wire or a wire, was sent from the East Bakersfield branch of the bank to the central office of the bank on November 12, 1948, stating that three checks drawn by Lofendo against the East Bakersfield branch were being rejected because drawn against uncollected funds; and that on the 13th the central office wired the Merchandise Bank and that the Merchandise Bank received the wire on the 15th.

The Court: The record may show that it is so stipulated.

Mr. Lasky: Yes.

Q. (By Mr. Erskine): Now, Mr. Etribou, was that the first [299] time that your branch had rejected any of the Lofendo checks?

A. To the best of my knowledge, yes.

Q. Now I would—

Mr. Erskine: I would like to have this wire marked.

The Clerk: Defendant's Exhibit N for identification.

(Whereupon wire referred to above was marked Defendant's Exhibit N for identification only.)

Q. (By Mr. Erskine): I show you a wire marked Defendant's Exhibit N for identification, Mr. Etribou, and ask you if that wire was sent by your branch?

(Testimony of Frank Etribou.)

A. Yes, it was originated at our branch.

Q. Now does that refresh your recollection, that wire, as to—

Mr. Lasky: May I see it if you are going to question him about it?

Mr. Erskine: Yes, pardon me.

(Document examined by Mr. Lasky.)

Mr. Lasky: All right, go ahead.

Q. (By Mr. Erskine): Does that wire refresh your recollection, that is, the wire Defendant's Exhibit N for identification, as to the date upon which you rejected, upon which your branch rejected, additional Lofendo checks drawn upon the account?

A. Yes, it was on November 16, '48.

Q. That was the—and on what ground, what reason is stated in that wire as the reason for the rejection?

A. Drawn against uncollected funds. [300]

Q. And that was the second time checks were rejected, is that right?

A. That is correct, yes.

Q. Now, Mr. Etribou, from testimony that I have read here, which says this:

“What made you think I suspected that?

“Did you never suspect that?

“At a later date I did.

“When was that?

“We found out that they had about two or three hundred thousand dollars worth of checks floating around with no funds to meet them.

(Testimony of Frank Etribou.)

“When did you find that out?

“On phone calls from various locations throughout the United States.

“At what time?

“What do you mean, what time?

“When were those phone calls?

“You mean the dates?

“Yes.

“Right after we started bouncing these checks.

“When was that?

“Oh, the records will indicate that.”

Now, when were those phone calls received with reference to this wire that has just been marked Defendant's Exhibit N for [301] identification? That is, the wire of November 16th?

A. When were the phone calls, you say?

Q. Yes.

A. Well, the phone calls were actually taken by Tarr, not by me.

Q. Do you have any recollection with reference to that wire, about when Tarr took the calls?

A. Well, they were immediately after that. Each day he would tell me about receiving a call from some bank, from eastern points, requesting information pertaining to the account.

Q. And it was in the week commencing on November the 15th, is that right?

A. That is correct.

Q. Now can you say, Mr. Etribou, with reference to these telegrams and these phone calls and

(Testimony of Frank Etribou.)

the testimony that I have read to you, can you give us approximately the date when you first suspected that a kiting operation was going on? That is, felt ethically—felt that something ethically wrong was going on? When did you first suspect that, when did you first feel that?

A. Well, right after we returned these checks.

Q. Which checks?

A. His checks—Lofendo's checks.

Q. Well, with reference to these wires, can you give approximately the date when you had that feeling that something [302] ethically wrong was going on?

A. Oh, I would say it was around the 13th, 14th; in there.

Q. Now, I would like to refer you again to your deposition, Mr. Etribou, and ask you if you gave this testimony.

Mr. Lasky: Page, please?

Mr. Erskine: It is page 135, commencing at line 18:

"Q. It is also alleged at the top of page 7 that for at least a month prior to November 15, 1948, United Produce Company was engaged in what is known in the banking business as kiting checks and was using Lofendo in order to engage in that practice. When did you learn that?

"We weren't sure that that was the case. They were supposed to be legitimate dealers, legitimate transactions.

(Testimony of Frank Etribou.)

"You say you weren't sure that that was the case? No.

"When did you become sure that it was?

"After we learned that they had checks bouncing all over the country.

"And when was that?

"Between the 15th and thereafter, after the 15th."

You gave that testimony, Mr.—

A. That is correct.

Q. And is that testimony substantially correct?

A. That is correct, yes.

Q. Now, counsel has referred you to a memorandum dated October [303] the 22nd. Counsel has referred you to that memorandum, which has been marked in evidence in this case as Plaintiff's Exhibit 12. Do you recall that memorandum, Mr. Etribou? A. Yes, I do.

Q. Prior to the time that memorandum was prepared, did you have a discussion with Mr. Tarr with respect to the Lofendo account?

A. He brought it to my attention.

Q. And you had a talk with him at that time about it? A. That is correct.

Q. Did you say in that conversation—was anything said in that conversation with Mr. Tarr with respect to the making of an inquiry at the Merchandise National Bank?

A. At my direction he made such an inquiry.

Q. That is, at your direction he inquired of the Merchandise National Bank with respect to the

(Testimony of Frank Etribou.)
standing of the United Produce Company, is that right? A. That is correct.

Q. Do you know whether he received an answer to his inquiry? A. Yes, he did.

Mr. Erskine: I would like to have this wire marked for identification, please.

The Clerk: Defendant's Exhibit O for identification.

(Whereupon wire referred to above was marked Defendant's Exhibit O for identification only.) [304]

Mr. Lasky: May I see what it is?

Mr. Erskine: Yes, it is the wire of October the 20th.

(Document examined by counsel.)

Q. (By Mr. Erskine): I will show you this document that has been marked Defendant's Exhibit O for identification and I will ask you if that is the telegram which Mr. Tarr showed you as having been received from the Merchandise National Bank?

A. That is the original telegram, yes.

Mr. Erskine: I would like to offer this in evidence, if the Court please.

The Court: Is there any objection?

Mr. Lasky: No objection.

The Court: So admitted.

The Clerk: Defendant's Exhibit O in evidence.

(Whereupon Defendant's Exhibit O for identification only was received in evidence.)

Mr. Erskine: I would like to read it to the Court,

(Testimony of Frank Etribou.)

if the Court will permit me. (Reading Defendant's Exhibit O.)

Q. (By Mr. Erskine): Now, do you know, Mr. Etribou, whether or not Mr. Tarr contacted the Fresno branch of the Bank of America for more information, as suggested by the wire?

A. He did, by phone.

Q. And did he report to you what he had been told by the Fresno branch?

A. Not in detail. However, he did say it was good, along the [305] same lines as this wire. They had a good record.

Q. That the United Produce, that the Merchandise had advised the Fresno branch that the United Produce Company had a good record, is that right? A. That is right.

Q. Now this memorandum, Mr. Etribou, the memorandum that has been marked Plaintiff's Exhibit 12, states:

"This has been taken up with Mr. Etribou, manager, and he has given instructions that we do not accept these checks for immediate credit until such time as Mr. Lofendo can be contacted and his method of operation discussed."

Now do you know when Mr. Tarr contacted Mr. Lofendo?

A. No, I don't know when he contacted him, but he did come to the branch.

Q. He did come, did Lofendo come to the branch? I withdraw that.

(Testimony of Frank Etribou.)

With respect to the date of this memorandum, October the 22nd, 1948, about when did Lofendo come to the branch?

A. Shortly after that. I don't recall the exact date.

Q. Shortly afterwards? A. That is right.

Q. Did you talk to Lofendo at that time?

A. No, I did not.

Q. Who talked with him at that time?

A. Mr. Cosgrove, my assistant manager. [306]

Q. And was Lofendo accompanied by anyone when he called at the branch?

A. I think a Mr. Rosenthal, who was vice president of the United Produce.

Q. And they had a talk with Cosgrove, did they?

A. That is correct.

Q. And that was shortly after your memorandum of October the 22nd?

A. Very shortly after that.

Q. In which you gave instructions that—in which you are quoted as giving instructions that "No checks should be accepted for immediate credit until such time as Mr. Lofendo can be contacted"?

A. That is correct.

Q. Lofendo came into the branch shortly thereafter? A. That is also correct.

Q. And had a talk with Mr. Cosgrove?

A. Correct.

Q. And you did not participate in that conversation? A. I did not.

Q. Did Cosgrove report to you after the conversation what had been said to him by Lofendo and

(Testimony of Frank Etribou.)

Rosenthal, or what had taken place in the conversation?

A. Yes, he told me that he was satisfied. However, he requested that they maintain a free balance and that they write him a letter explaining their operations. [307]

Q. Cosgrove told you that, did he?

A. That is correct.

Q. He told you that they had satisfied him, that he had told them that they should carry a balance and they should write him a letter describing their operation, is that correct?

A. That is correct.

Q. And from then on the account was carried on substantially as it had been previously, is that right? A. That is right.

Q. Counsel has called your attention, Mr. Etribou, to the memorandum of November 15th. This memorandum says, "In further to the activities and operations of the account of Frank C. Lofendo, shortly after the last memorandum, Mr. Lofendo flew from Chicago with the president of the United Produce Company. The matter of his deposits in checks drawn against his account was discussed with Joseph V. Cosgrove, assistant manager . . ." And skipping—"This matter was again rediscussed at our officers' meeting on Wednesday, November 10th, and at that time Mr. Etribou insisted that all items deposited should be cleared before credit is allowed."

Now, Mr. Etribou, referring you to that memorandum, which you initialled, and which has been

(Testimony of Frank Etribou.)

introduced as evidence in this case, and marked Plaintiff's Exhibit 13, I will ask you whether or not at that officer's meeting on Wednesday, November 10th, was there any discussion as to whether or not Cosgrove had received the letter for which he had asked. [308]

A. I asked him the question. It had not been received.

Q. When he told you it had not been received what did you say?

A. I told him to follow my instructions.

Q. That is not to pay any checks except against collected funds? A. Correct.

Q. Did you know anything at that time, on November 10th, that anything crooked was going on in connection with this account?

A. No, I did not.

Mr. Lasky: I think, if your Honor please, that that is calling for his conclusion.

Mr. Erskine: Well, it is an answer to your cross-examination.

Mr. Lasky: It is an ultimate conclusion. Whether he believes is another thing.

The Court: Overruled. You may answer the question.

Q. (By Mr. Erskine): Did you believe at that time that anything crooked was going on in connection with this account?

A. I didn't know of anything that was going on, no.

Q. Did you believe it?

(Testimony of Frank Etribou.)

A. No, I had no proof.

Q. In conducting your banking business, Mr. Etribou, and as an experienced banker, do you presume a man is innocent until he is proven guilty? I do not know how else to express it and I [309] want to get that.

A. They are all honest until we find out differently. We would have a difficult time conducting our business if we did not.

Mr. Lasky: I would go so far as to stipulate, counsel, that bankers have to avoid charging people with wrong doing or the banks will be sued all the time. A banker's life is not an easy one.

Q. (By Mr. Erskine): In other words, Mr. Etribou, you do not charge a man with fraud, kiting, or anything else unless you have some proof that that is what he is doing, is that right?

A. That is correct.

Q. On November 10th you did not have any proof of that sort with respect to this account?

A. None whatsoever.

Q. Mr. Etribou, counsel has referred to your experience as a banker. How long have you been a banker?

A. This is my first and only job. I started in as a messenger and now I am the bank manager.

Q. In the same branch?

A. The same—its predecessors.

Q. And the same banking quarters?

A. No, we recently moved. I have a new office.

Q. About how long is that, Mr. Etribou?

(Testimony of Frank Etribou.)

A. Thirty years. [310]

Q. At the present time how much in deposits has your branch got?

A. Approximately twenty million.

Q. Was that so in 1948?

A. Very close to that. It might have been a little more or a little less.

Q. When did you first meet this man Lofendo?

A. He was introduced to me by Mr. John J. Tozzi. He was a valued client of ours and a friend.

Q. Had you known Tozzi—is that the way you say it? A. Yes.

Q. Had you known Tozzi long?

A. Oh, yes, he is a farmer-shipper.

Q. Has he a good reputation in the community?

A. Yes, he has.

Q. Did you state when you met Lofendo?

A. He brought him into the bank and introduced him.

Q. About when?

A. Oh, the signature card would indicate the date his account was opened.

Mr. Lasky: We stipulated the other day that was about March 12th.

Mr. Erskine: Yes.

Q. That was about the date?

A. That was exactly the date. [311]

Q. That was the first time you had met Lofendo?

A. First time I had seen him in the bank.

Q. What did Tozzi tell you about it?

(Testimony of Frank Etribou.)

Mr. Lasky: That is hearsay, what was said on March 12th.

The Court: What is the purpose of this, counsel?

Mr. Erskine: I want to show that the man was introduced to the branch as a reputable decent man. That is all.

The Court: I do not think there is any question about that, that the bank was doing the right thing in opening an account for him and doing business with him. I do not think it is of any importance in any event.

Mr. Erskine: Very well. I will withdraw the question.

Q. After he was introduced to you, did you see Lofendo again on any occasion?

A. I never saw him in the bank but I do eat my lunch at the Bakersfield Inn, and if my recollection serves me right, I saw him there just in passing, that is all. I think he stopped there, I am sure he did.

Q. After he opened the account you did not have any real contact with him?

A. I never had any contact of any kind.

Q. Did he borrow any money from your branch?

A. No, sir.

Q. Did he ever apply for a loan at your branch?

A. Not with me or any of the other officers. [312]

Q. You testified, Mr. Etribou, with respect to a conversation which took place between you and Mr. Messenger on November 17th. Had you ever known Mr. Messenger prior to that conversation?

(Testimony of Frank Etribou.)

A. I had never seen him until the day I met him here.

Q. You had never talked to him over the phone prior to that time?

A. Just that one conversation only.

Q. Had you ever had any contact with the Merchandise National Bank prior to that day, conversation with any of its officers? A. No.

Mr. Lasky: You do not mean to negative that they had business transactions?

Mr. Erskine: No, just personal contact between any of the other officers of Merchandise National Bank.

A. No, I did not.

Q. (By Mr. Erskine): You had received this wire of October 20th that has been introduced in evidence; that is correct, is it not, the wire Defendant's O? A. Yes.

Q. But you had not had—

A. No conversation, phone conversations.

Q. And you did not know personally any of the officers of that bank?

A. Never seen them or met them.

Q. Was anything said in that conversation between you and Mr. Messenger with respect to whether or not the Merchandise Bank [313] was in trouble because of transactions in the United Produce Company matter?

A. Well, I gathered so by the tone of his voice. He seemed to be a little bit excited.

(Testimony of Frank Etribou.)

Q. Did he say anything to that effect that you can recall?

A. I can recall the conversation very vividly.

Q. Just tell us the conversation.

A. In my own simple way I think I can tell it.

Q. What is that?

A. In my own simple way I think I could tell it all in a very short time.

Q. All right, tell us the conversation.

A. I was told I had a long distance call from Chicago. The man on the other end told me he was the comptroller of Merchandise National Bank and his name was Messenger. He asked me if I knew anything about the account of Frank C. Lofendo, if I was familiar with it. I told him that we had such an account, and he very rapidly read off a lot of figures. He wanted me to find out if they were paid, and I wrote down a couple of them and I said, "Just a minute. It appears to me we are doing this the hard way. Why don't I get the account or have somebody bring it to me and you read off the checks that are paid. You check them off your list."

He said, "That is a good idea."

I immediately called Mr. Tarr across the lobby and requested [314] he produce the account, which he did.

Q. Would it bother you if I interrupted you at that point? A. Not at all.

Q. I will show you a document which has been introduced in evidence in this case, Defendant's Exhibit C, and I will call your attention to both pages

(Testimony of Frank Etribou.)

of that document and ask you if that is the part of the commercial ledger account of Lofendo with the bank which you asked Mr. Tarr to bring to you?

A. That is correct. This is a certified copy made by one of our bookkeepers, a Mr. Tarr. It has been checked.

Q. You asked Tarr to bring you that document, did you?

A. That is correct. He sat at my desk while I carried on a conversation with Mr. Messenger, and we discussed the account in detail. I gave him the checks that were paid from a specific date. I don't recall what date he was interested in. And we discussed the account in detail as to balance, deposits, and debits. He asked me if I had received an advice of credit covering the six checks that we have heard so much about, and I told him—he said it was mailed on the 15th.

I said, "If that is the case, we should have it today." However, the collection department was closed and I had no way of determining if they were in our office, and he told that he would like to have me offset that particular entry.

A. Would you let me ask you at this time, Mr. Etribou, what did you understand Mr. Messenger to mean by the word "offset"? [315]

A. To cancel it.

Q. That is a reversing entry?

A. That is correct.

Q. Go ahead.

A. I told him I was sorry, I couldn't go along

(Testimony of Frank Etribou.)

with him on that score. However, if he was in trouble, and I assumed that he was, that I would be very happy to do anything I could to assist him and his bank, providing it did not cost us anything.

He asked me then if we had airline service into Bakersfield. I told him yes, that United came in there. He said he was going to send a man out to Bakersfield and he would be there the following morning. I told him if he would have his man call me or wire me, I would pick him up and bring him to the bank. He did not show up.

Mr. Lasky: I move to strike that last as not part of the conversation.

Mr. Erskine: That is all right. It may go out.

The Court: It may be stricken at this point.

The Witness: That is about the extent, the principle, the meat of it.

Q. Was anything said in that conversation, Mr. Etribou, with respect to the name of this man that was going to come out?

A. I don't recall whether he mentioned the man that would come out. He said he would send a man out.

Q. Was anything said in that conversation with respect to the [316] question of whether or not that man should bring any checks with him?

A. Oh, yes. I will add it to it. I told him if he had any checks of Lofendo, and the signature was genuine, if he brought them out and we had a black balance, that I would give him preference, inasmuch as he was a correspondent bank of our bank.

(Testimony of Frank Etribou.)

Q. Did you tell Mr. Messenger in that conversation that you would either not enter the credit or you would enter the credit and charge checks against it, whichever the Merchandise Bank wanted you to do?

A. I told him I couldn't go along with him. He requested that I offset the entry. I told him I could not do that. I had no right to do it.

Q. I would like to get an answer yes or no to the question I just put to you, Mr. Etribou. Did you tell Mr. Messenger at that time that you would either not enter the credit or you would enter it and charge checks against it, whichever the Merchandise Bank wanted you to?

A. I was going stand on the entry, yes.

Q. Did you tell that to Mr. Messenger?

A. Oh, no, I didn't tell him that.

Q. Did you tell him anything like that?

A. All I told him is I couldn't go along with his request.

Q. And his request was that the credit be offset, is that it? [317]

A. That is correct, and as far as I was concerned, the transaction was closed and I would follow the regular procedure.

Q. Now, I believe that you have stated that in your discussion with Mr. Messenger you told him to read off the checks in which he was interested commencing on a certain date, is that right?

A. That is correct, yes. [317-A]

(Testimony of Frank Etribou.)

A. That is correct, yes.

Q. You say that you can't recall now exactly the date which he specified?

A. No, I can't. He was the one who was asking the questions and I gave him the information.

Q. I believe you have testified that you then read off the debit items in the account to him?

A. That is correct.

Q. You have stated that you also discussed the account in general, and read off the credits in the account?

A. I read off anything and all pertaining to the account.

Q. From the date he specified?

A. That is right.

Q. Including the credit items as well as debit items?

A. That is right. I told him I didn't know what other items we had in our work.

Q. What do you mean in your work, Mr. Etribou?

A. Well, items that might have come in but had not been posted.

Q. You told Mr. Messenger that, did you?

A. That is correct.

Q. Did you tell him the amount of the balance to the credit of Lofendo as of the date of which you were talking with him? A. The conversation?

Q. Yes.

A. I am certain of that. [318]

Q. Referring you to this exhibit, Defendant's

(Testimony of Frank Etribou.)

Exhibit C, what did you tell him with respect to that?

A. The balance I think was—that was on the 15th—17th—this delayed posting deal, I can't tell you—\$699.02—I am sure that is correct.

Q. That is what you believe you told him?

A. Yes.

Q. Now, Mr. Etribou, was anything said in the conversation with respect to any outstanding collections of the Branch on which you had not yet received some return?

A. Yes, we discussed that and Tarr got me that information.

Q. What was said in that respect with Mr. Messenger?

A. He was told that we had checks totaling one hundred and fifty some odd thousand dollars that had been sent to him for collection. I think two collection letters made up that total. I do not recall that amount.

Q. You told that to Mr. Messenger?

A. Tarr got me the information, yes.

Q. That two collection letters had been sent out upon which you had not received a return?

A. That is right.

Q. What is your best recollection with respect to the amount of those collections letters?

A. Oh, they totaled one hundred and fifty some odd thousand, I think.

Q. Did they include the collection for the six checks for [319] \$113,000? A. That is correct.

(Testimony of Frank Etribou.)

Q. I believe you testified in answer to questions put to you, by Mr. Lasky that one reason why you entered the credit of \$113,000 to the account on November 19th was to meet the overdraft arising out of the fact that \$97,000 in checks had been rejected; that is correct, is it?

A. That is correct.

Q. Did you have any other reason for entering that credit, Mr. Etribou, other than the one stated by Mr. Lasky?

A. Yes, the funds belonged to Mr. Lofendo. We were acting as his agent.

Mr. Lasky: If that is merely what he thought I have no objection.

The Court: Yes. The conclusion as to whether he was acting as agent is something the Court will decide.

Mr. Erskine: I agree that that go out.

Q. In other words, one of your reasons for entering the credit was you believed those funds were Lofendo's funds?

A. That is correct, they were.

Q. Now, Mr. Lasky asked you whether or not you inferred—I ask you this in substance—whether or not you inferred what the Merchandise National Bank done with respect to the six checks from the statement made to you by Messenger that the advice of credit had been sent out. Do you recall that, Mr. [320] Etribou?

A. I think he told me he had made a mistake.

(Testimony of Frank Etribou.)

Q. I asked you if you recall Mr. Lasky stating it? A. I do not think so.

Q. Mr. Lasky asked you, according to my recollection, whether or not you had inferred anything with respect to what the Merchandise National Bank had done with respect to the six checks from Messenger's statement to you that the advice of credit had been sent out. Do you recall that?

A. He told me that advice of credit had been sent out, yes.

Q. What did you infer from that as to what the Merchandise Bank had done with respect to the six checks?

A. The customary procedure. They charged the account of the client and credited our head office, our account with the amount. The transaction was closed.

Q. At the time you had your conversation with Mr. Messenger did you have any opinion as to whether or not your bank, in view of those acts of the Merchandise, could agree to the revocation or cancellation of this credit?

A. I do not see how they could.

Q. Your opinion was that you could not, is that it? A. That is right.

The Court: That again is one of those. Do you mean you are asking his opinion as to what he could do under the law?

Mr. Erskine: Yes, as of the date of the conversation. [321]

(Testimony of Frank Etribou.)

Mr. Lasky: I have not objected because I asked him what he had in his mind at the time.

The Court: I understand the situation.

Q. (By Mr. Erskine): You were examined with respect to certain letters received by you from Mr. Duncan. Did you have a telephone conversation with Mr. Duncan of the main office of the Branch on November 18th?

A. Yes, I had several calls.

Q. Several calls, did you say?

A. From head office, yes. I had a call from Mr. Duncan, yes.

Q. Do you recall your conversation with Mr. Duncan? A. Very short.

Q. What was the conversation?

A. Well, he was discussing various bookkeeping entries concerning the account of Lofendo and I would have to get the information from Tarr, so I referred the call to him.

Q. You talked with Mr. Duncan for a few minutes and then referred him to Mr. Tarr?

A. Just a very short time.

Q. Did Mr. Tarr have a conversation with him then?

A. He did, yes. I switched the call.

Q. Did you in that conversation with Mr. Duncan have any discussion with respect to the advice of credit?

A. I doubt very much if we had much to say about that. In fact, my conversation was a very short one. [322]

(Testimony of Frank Etribou.)

Q. The very next day, however, you received this letter, Plaintiff's Exhibit 11, from Mr. Duncan, did you? A. That is correct.

Q. You were asked by Mr. Lasky when you entered the credit for the six checks to the Lofendo account. When was that, Mr. Etribou?

A. When we made the entry, you say?

Q. Yes.

A. We received it at 8:15 and it was made shortly after that on the 19th. We were expecting it, and we certainly would not delay the making of the entry.

Q. When you say that it was received at 8:15, on what do you base that statement?

A. The time stamp that appears on the reverse side.

Mr. Lasky: We stipulated when that was received.

Q. (By Mr. Erskine): The time stamp you refer to is the one marked "East Bakersfield Branch," is that correct? A. That is correct.

Q. And that time stamp indicates the advice of credit was received at about 8:15, was that right?

A. That is correct.

Q. And your testimony is that you directed that the credit be entered shortly thereafter?

A. That is right.

Q. What time of day did you receive this letter, if you can [323] recall, this letter of November 18th, 1948, addressed to you by Duncan?

(Testimony of Frank Etribou.)

A. The time stamp indicates 2:00 o'clock on November 19th.

Q. That is the time stamp on the letter indicates that you received it at about 2:00 o'clock?

A. That is right.

Q. When you received it, on the day that you received it, did you write in the margin of the letter the words that Mr. Lasky read to you: "Like Hell I will"? A. That is correct.

Q. On that same day? A. Yes.

Q. At the time you wrote those words, on the margin was the credit entered or was it not?

A. It had already been made.

The Court: Gentlemen, I think it is time to recess. The Court will stand in recess until 2:00 o'clock this afternoon. [324]

Tuesday, June 20, 1950—2 P.M.

The Clerk: Merchandise National Bank v. Bank of America, on trial.

FRANK C. ESTRIBOU

called as an adverse witness on behalf of the plaintiff, resumed the stand; previously sworn.

Direct Examination
(Resumed)

By Mr. Erskine:

Q. Now, Mr. Etribou, I want to call your attention to this Defendant's Exhibit C here, the ledger sheet of the Lofendo account, and calling your

(Testimony of Frank Etribou.)

attention to any of the items entered in the balance column on the second page of this—take, for example, the item \$699.02, entered as of November the 15th, 1948—I will ask you whether or not as a manager, you, by looking at that ledger sheet, can get a definite answer to the state of depositor's account, by looking at the ledger sheet?

A. Just the items that are posted only. There may be other work in the bank that hasn't been posted, both debits and credits.

Q. The Bank practices a method known as post dating, does it not?

A. Delayed posting, yes.

Q. Delayed posting. And that practice is that it posts items received on or counter work received on one day on the day [325] following the day on which they are received, is that right?

A. That is correct.

Q. And so by looking at the—withdraw that.

Is it correct to say that the items entered in this column balance is what you bankers call a noonday balance?

A. I think that is what they term it, yes.

Q. And is it correct to say that the noonday balance in and of itself does not reflect, or need not necessarily reflect, the true state of the customer's account? A. As of that time?

Q. Yes.

A. That is right, it doesn't always reflect the true status.

Q. Because there may be items in the work?

(Testimony of Frank Etribou.)

A. Unposted items.

Q. Unposted items that do not appear as of that day on the ledger sheet? A. That is correct.

Q. Now counsel asked you, Mr. Etribou, about your practice, the practice of the bank, with respect to entering credits, and he called your attention particularly to the advices of credit similar to Defendant's Exhibit A, which has been introduced in evidence in this case (handing to witness); and I will ask you, Mr. Etribou, to clear up what seems to me to be somewhat of an inconsistency in the testimony. I will ask you to state what is the practice of the bank with respect to [326] entering credits when items are sent out by the bank for collection?

A. Ordinarily we wait until we have the advice of credit in our possession. That is, where we request advice of payment by ordinary mail. If it were by telegraphic instructions, why, we would naturally pass credit on it upon receipt of the wire, if it was paid.

Q. Well, if you ask for telegraphic instructions, why, when you receive the wire, you enter the credit? A. That is correct.

Q. And if you ask for instructions by mail, then you wait for an advice similar to Defendant's Exhibit A, is that right? A. That is correct.

Q. Now, do you ever, Mr. Etribou, in such a case, enter a credit in accordance with the practice of the bank when you have asked for mail instruc-

(Testimony of Frank Etribou.)

tions, prior to the receipt of an advice of credit respecting the transaction?

A. Yes, quite often. In the case of a client, for instance, if he would come in and ask for immediate credit on an item that we know had reached its destination, we would call and request information pertaining to its fate, as to whether it was paid or unpaid.

Q. Yes?

A. And if the bank payor would indicate that it had been paid, why, we would follow the practice and give our client immediate [327] credit.

Q. Without waiting for the advice?

A. That is correct.

Q. Now I think you have said that you had a conversation with Mr. Duncan on November the 18th. Did you have a conversation with Mr. Kenneth Johnson, an assistant counsel of the bank, on that day? A. Yes, I did.

Q. Tell us, was that conversation in the morning or the afternoon?

A. I think, I am almost sure it was in the morning.

Q. In the morning?

A. It is pretty hard to state. I can't remember, I am sorry.

Q. You don't recall that?

A. No, I couldn't tell you the exact time.

Q. Do you recall the conversation at all, Mr. Etribou?

A. Oh, it had to do with this \$113,000 odd, and

(Testimony of Frank Etribou.)

he informed me that Mr. LeRoy was in his office and that LeRoy had informed him that the advice had been sent out in error, and that the checks had not been paid, and as a result of that, he thought that we should go along with his request that we not pass the entry. I told him, as I had previously stated to Mr. Messenger, that we would be very happy to help him if we could, providing it didn't cost us anything.

Q. Did Mr. Johnson say anything or ask you with respect to [328] the status of the account?

A. I told him that as far as the account was concerned, at that moment it appeared to be all right.

Q. That is, it appeared to have a black balance?

A. That is correct.

Q. Now just a few more questions, Mr. Etribou; according to the custom of your branch, when checks are received for deposit, what can the bank do with respect to those checks, what two courses can it take?

A. It can either give you immediate credit or enter them for collection.

Q. Now your bank, I presume, your branch, has customers who are both depositors with the branch and also borrowers from it? A. That is right.

Q. And the branch, I presume, keeps a ledger sheet showing the status of the commercial account and also the record of the loan, does it?

A. Yes, that is separate and apart.

Q. And do you regard, when a customer is both

(Testimony of Frank Etribou.)

a borrower and a depositor—do you regard the ledger sheet of his commercial account and the ledger of his loan as one account?

Mr. Lasky: Now, just a moment. If the Court please, I have two objections to that. First, of course, it isn't cross.

Mr. Erskine: It is what? [329]

Mr. Lasky: It is not cross-examination of anything asked on direct. But more important than that, what this witness and his branch may regard the situation to be with respect to his customers has nothing to do with the case and no bearing upon what—

The Court: It doesn't have any bearing upon Lofendo's account, does it?

Mr. Erskine: No, sir.

The Court: It has none. That is not the situation.

Mr. Erskine: No, it doesn't. It is just as a sort of a rebuttal to the statement that Mr. Messenger—

The Court: Well, what his practice is down there wouldn't have any bearing upon what the practice is in Chicago.

Mr. Erskine: Well, I imagine that the practice throughout the country is about the same, so far as matters of that kind go, that sort are concerned.

The Court: I will sustain the objection.

Mr. Erskine: Well, I think then that that is all.

Mr. Lasky: I have a few questions, if the Court please.

(Testimony of Frank Etribou.)

Now, I might say, before going on with this witness, that this subject of practice on cash and collection letters has come up over and over again, and it came up yesterday, and instead of going into further interrogation of this and other witnesses, I have drafted a form of stipulation which I think if we could enter into might save a great deal of time. [330]

The Court: All right.

Mr. Lasky: And I think at some convenient time we might handle that in the manner in which we have been handling such things. I will give a copy to counsel.

Mr. Erskine: I will be glad to stipulate. I think that we will be able to save some time and agree, your Honor.

The Court: Yes. I think you can agree. As a matter of fact, there is no real conflict in what has transpired in connection with it.

Mr. Lasky: No. I think we ought to—

The Court: That is, you are talking about whether a credit is given or not, if an item is deposited for collection, as to when the credit is given.

Mr. Lasky: Yes, and the whole business of what happens when you send out a cash letter and what happens when you send out a collection letter—

The Court: Yes.

Mr. Lasky: Now the stipulation I proposed here is slightly over a page long, and I think we ought to be able to come to some agreement on it as to banks' understandings.

(Testimony of Frank Etribou.)

The Court: If you will read it right now, perhaps we could agree on it.

Mr. Lasky: Shall we read it aloud?

The Court: No, let counsel read it.

(Proposed form of stipulation examined by counsel.) [331]

Mr. Erskine: Mr. Tobey suggests that sometimes a letter of cash, or a cash letter, describes the item; but I don't think it makes any difference.

The Court: So far as a cash letter is concerned, what difference does it make? It is not involved.

Mr. Tobey: It shouldn't be in there because it is a different practice.

Mr. Erskine: I agree with Mr. Lasky, your Honor, that it is important for us to have this distinction in mind. It will appear later in the case, I am sure.

The Court: You want to have it in?

Mr. Erskine: I agree with him that it is necessary.

Mr. Lasky: Yes, I think, without having it in there, maybe there will be confusion. That is all I am thinking of.

The Court: Very well.

(Proposed form of stipulation examined further by counsel.)

Mr. Lasky: Off the record, your Honor?

The Court: Very well, off the record.

(Testimony of Frank Etribou.)

(Off the record discussion among counsel and Court.) [332]

Mr. Erskine: With those changes it is all right.

Mr. Lasky: Then I offer this as Plaintiff's Exhibit next in order, and it is stipulated it may be deemed to have been read in evidence.

Mr. Erskine: You have made those changes as we went along?

Mr. Lasky: I made them on the original as we went along.

The Court: It is so admitted.

(The stipulation referred to was thereupon received in evidence and marked Plaintiff's Exhibit 18.)

Mr. Lasky: I have a few questions of Mr. Etribou.

Redirect Examination

By Mr. Lasky:

Q. Now, Mr. Etribou, you referred to a wire you received or your Branch received from Merchandise National Bank on October 20th, marked in evidence as Defendant's Exhibit O (and I call your attention to the wire itself). Do you recall that sentence "Impossible for us to set limit on acceptance of their checks." They are referring to United Produce Company, is that right?

A. "Impossible for us to set limit." That is correct.

Q. "On acceptance of their checks." Now, when

(Testimony of Frank Etribou.)

that wire was called to your attention, you understood by the sentence, "Impossible for us to put limit on acceptance of their checks," the Merchandise Bank was saying they could make no suggestion then as to whether you were safe in giving credit on the United [333] Produce Company's checks in any amount or what amount, is that right?

A. That is what it says. No other bank would phrase it any differently either.

Q. Certainly, and as a matter of fact, you took that as a kind of warning signal, did you not?

A. No, that is common procedure.

Q. You considered that of such importance or sufficient importance that you had precisely that same sentence inserted in the Tarr memorandum of October 22. I call your attention to the sentence, "A few days ago we wired Merchandise National Bank asking for the financial responsibility and the top limit for acceptance of checks on United Produce Company," and so forth.

A. That is his phraseology, not mine.

Q. You saw the memorandum.

A. That is correct.

Q. The contents of this was discussed when it was prepared?

A. No, it was not. It was handed to me and I initialed it.

Q. All right. You saw that sentence in there when you initialed it? A. That is right.

Q. And you have already stated your understanding of the meaning of that language. You then

(Testimony of Frank Etribou.)

testified on your cross-examination that you asked Mr. Tarr to get in touch with your Fresno Branch because there was a suggestion in that wire [334] from Merchandise National Bank and that Fresno might have more information it?

A. For further particulars, I believe.

Q. Mr. Tarr, you say, did get in touch with your Fresno office? A. By phone.

Q. And talked to the Branch Manager, Ralph Rehorn, is that correct?

A. I think he talked to Nelson, as I remember it.

Q. But after he got through talking with the Fresno office he told you that Fresno knew no more about the situation than was stated in the wire that you got from the Merchandise Bank?

Mr. Erskine: Just a second—

Mr. Lasky: I am asking him if that is not so.

Mr. Erskine: You are not attempting to state the testimony he gave on my cross-examination, I take it.

Mr. Lasky: I am attempting to bring out more testimony.

Mr. Erskine: I see, because if you are attempting to state the testimony he gave on the cross-examination, it is not a correct statement.

Mr. Lasky: I am not attempting to restate testimony, because I do not waste time that way.

The Court: It is just cross-examination by going further.

Mr. Lasky: Going further with the subject.

(Testimony of Frank Etribou.)

(The last question was read by the reporter.)

A. It is my understanding he said their record was good or [335] words to that effect.

Mr. Lasky: I call your attention to this exhibit, Plaintiff's Exhibit No. 12, Mr. Tarr's memorandum of October 22, which says, "Mr. Nelson of Fresno main office has been contacted and the information he gave us was no more than was contained in our wire of response."

A. I still contend it was good because that wire was certainly anything but detrimental.

Q. But you understood from that wire, as you have already testified, that Merchandise was telling you they could make no indications as to how far you were safe in accepting United Produce Company checks?

A. That is correct. Any bank would do the same thing.

Q. But after you had talked to Fresno and after you got that wire from Merchandise Bank a couple of days later, you did give the instructions, did you not? A. That is correct.

Q. That your Branch would not take United Produce checks or give credit on them until collected?

Mr. Erskine: Wait a second. That is not a direct statement either.

Mr. Lasky: I am asking questions.

Mr. Erskine: I know, but you state the question

(Testimony of Frank Etribou.)

as though it is testimony. That is not the testimony.

The Court: No, it is not, counsel, but counsel is not [336] limited to that. He can probe the question and probe the witness' mind with reference to the matter.

Mr. Erskine: It is a little bit misleading though to purport to state testimony.

The Court: I do not understand it as purporting to state the testimony. He is just asking him as a matter of fact a certain set of circumstances did not exist. The witness may answer yes or no.

(The question was read by the reporter.)

A. I gave such instructions but I do not recall the date. The records will indicate that.

Q. (By Mr. Lasky): Yes. Now, if you need the records to refresh your memory, the wire from Merchandise National Bank was October 20th, was it not? I think the date is right on its face.

A. It is dated October 20th.

Q. Yes, and then the memorandum of October 22nd, which states your instructions, refers to the wire and to the telephone conversation with Fresno, so that memorandum was written after those events, was it not? A. That is correct.

Q. Now, carrying the subject a little further, Mr. Etribou, it is a fact, is it not, that Fresno office told your branch, and you were so informed by Mr. Tarr, that it was not giving immediate credit at its branch to any checks of the United

(Testimony of Frank Etribou.)

Produce Company until collected; that is true, is it not? [337]

A. They may have told Tarr that.

Q. And Tarr told you that?

A. Well, that is possible, too. I do not recall that particular phase of it.

Q. And after considering all of that information you decided to put in the same kind of instruction at your Branch and did, correct?

A. The records indicate that.

Mr. Erskine: What is the answer?

Mr. Lasky: "The records indicate that," is his answer.

The Court: Yes.

Q. (By Mr. Lasky): Sometime later, as I understood you to testify on the cross-examination, Mr. Rosenthal and Mr. Lofendo called at your Branch—I think you said it was sometime within a week or so afterwards—and talked to Mr. Cosgrove? A. That is correct.

Q. And that they gave some kind of explanation to Mr. Cosgrove and that Mr. Cosgrove told you about it? A. That is correct.

Q. And you were satisfied with it at the time?

A. No, he was satisfied.

Q. Oh, he was satisfied?

A. That is right. I did not talk to him.

Q. I understand you did not talk to them, but you talked to Mr. Cosgrove? [338]

A. Cosgrove said he was satisfied with the ex-

(Testimony of Frank Etribou.)

planation and requested a certain explanation and certain letter of them.

Q. Did that report to you allay your apprehension about United Produce Company checks?

A. Did it what?

Q. Did it allay your apprehension about United Produce Company checks?

A. Well, it had some effect on it, yes.

Q. And so you relied upon the report that Mr. Cosgrove made of the explanation given to you by Rosenthal and Lofendo, correct? A. Yes.

Q. Mr. Cosgrove reported to you, did he not, that he demanded that Rosenthal confirm the explanation by a letter? A. That is correct.

Q. And he was promised that letter within the next week or so? A. That is correct.

Q. Within a week or approximately, not over ten days, Mr. Cosgrove told you, did he not, reported to you that the promised letter had not arrived? A. That is correct.

Q. And he further told you, did he not, that the failure of that letter to arrive had completely shaken his confidence in the truth of Rosenthal's explanation? A. I do not recall that phase of it. [339]

A. No.

Q. But it was after he reported to you that the promised letter from Rosenthal had not arrived that you issued your other instructions on November 10th reiterating your insistence that United Produce Company not be given credit?

A. I think those dates are correct.

(Testimony of Frank Etribou.)

Q. Pardon me?

A. I say, I believe that date is correct.

Q. Now passing over to another subject, you testified you had two telephone conversations on the 19th of November, one sometime in the morning, one going on at the time Mr. LeRoy came in the Branch there around 2:15 or thereabouts in the afternoon. Was there still a third one along about 4:30 or 5 p.m.? A. With Schilling.

Q. Yes. A. If there was, I don't recall.

Q. You do not recall any such conversation?

A. I recall talking to Schilling.

Q. Yes, and one of them was in the morning you testified? A. That is correct.

Q. And another one you say was when Mr. LeRoy was present?

A. He was in the bank at the time he called me.

Q. Have you placed the time of that one?

A. That was after three o'clock because the bank was closed. [340]

Q. Was it before four?

A. That is pretty hard to say. That is almost a year and a half ago.

Q. I understand. It was not as late as 4:30?

A. I hardly think so.

Q. So to the best of your recollection you did not have a telephone conversation with Mr. Schilling as late as 4, 4:30 in the afternoon?

A. I hardly think so.

Q. That is the best of your recollection, that what I say is correct?

(Testimony of Frank Etribou.)

A. Around 4:00 o'clock.

Q. I do not understand you now.

A. I said it was around 4:00 o'clock as near as I can recall.

Q. That you had your second telephone conversation with Mr. Schilling? A. That is right.

Q. And Mr. LeRoy arrived that late in the afternoon?

A. He was in the lobby at the time. I didn't even know he was LeRoy.

Q. I understand what your testimony is. Mr. Etribou, the day before, on the 18th, when you had your telephone conversation with Mr. Johnson, I understood you to say that Mr. Johnson told you that if you were in the clear you were to follow Merchandise's instructions about the advice of credit, is that right? [341]

A. I think he stated that we should, yes.

Q. Mr. Johnson was a lawyer for the Bank, or one of the lawyers for the Bank, was he not?

A. Yes.

Q. And yet I understood you to say earlier today that when you decided the next day to pass credit for the \$113,000.00 to the Lofendo account, you did it for two reasons: One, to protect yourself on the \$97,000 and the other, because you thought you had some legal obligation to Mr. Lofendo, is that right?

A. That is right.

Q. But the day before you had talked to your attorney and had been told by your attorney that you should follow Merchandise's instructions if

(Testimony of Frank Etribou.)

you were in the clear. Were you deciding to ignore your attorney's advice about the law?

A. I do not very often do anything like that.

Q. But in this case you decided to do so?

A. I think I did.

Q. You also testified, if I understand you correctly, that in your telephone conversation with Mr. Messenger you told him that you would be very glad to help Merchandise out provided it did not cost your Branch anything? A. That is right.

Q. And if I understood your testimony also, you testified in your telephone conversation that Mr. Johnson on the next day, the 18th, you told him very much the same thing: You would be [342] glad to help Merchandise out and follow LeRoy's instructions which he had given to Mr. Johnson, provided it did not cost your branch anything, is that right? A. That is right.

Q. Then it at that time the only thing that was in your mind was to protect your branch, you were not interested in Lofendo's rights, were you?

A. Naturally we were interested in ourselves first.

Q. And Mr. Lofendo's rights and your duty to Lofendo did not pop into your head until you had decided to protect your own loss by taking the \$113,000, is that correct?

A. That is what I stated.

Mr. Erskine: What is that?

Mr. Lasky: He said "That is what I stated."

(Testimony of Frank Etribou.)

Q. Now, at the time you talked to Messenger on the 17th, and again when you talked to Mr. Johnson on the 18th and to Mr. Duncan on the 18th, you believed and you understood that your branch was in the clear?

A. We thought we were, yes.

Q. You had given instructions some time ago before, you have testified, that no checks were to be credited until collection had been made?

A. That is correct.

Q. And you believe that had been done?

A. I thought it had, yes. [343]

Q. And then if you felt so sure that your bank had not paid out anything on checks which had not been collected, why did the possibility occur to you that your branch might not be in the clear?

A. Well, there might have been other work in the bank that I knew nothing about.

Q. You mean you thought it was quite possible at that time that somebody in your branch had violated your instructions?

A. No, that is not what I said. I said there was a possibility there might be other work in the bank that had not been posted.

Q. How could there be any other work in the bank, although not posted, which would show you that you were not in the clear if your instructions had been followed?

A. If my instructions had been followed, naturally there would not be any work in the bank, but they had not been followed.

(Testimony of Frank Etribou.)

Q. Now, but you did not know it at the time?

A. I did not.

Q. You tell us now you would help Merchandise if you were in the clear? A. That is right.

Q. But even though you thought you were in the clear and had no reason to suppose there was any reason you could not be in the clear, you want us to believe that when you were talking to Mr. Messenger and Mr. Johnson, you said you would help them only if you were in the clear, is that right? A. That is right. [344]

Q. Now is it not a fact that on Sunday, the 21st of November, at your office in Bakersfield where a group of men met—you, Mr. LeRoy and your Bank's attorney, Mr. Bianco—either you or Mr. Bianco said to Mr. LeRoy, you offered to give him the \$30,000 balance in settlement of the claim? That happened, did it not?

A. If any statement was made of that kind, it was made by Bianco, not by me.

Q. All right, was that statement made by Bianco?

A. I don't know whether it was or not.

Q. Personally you can't testify to the matter?

A. I can't, no; because I wasn't listening.

Q. Well, if you can't, we won't go into it. And now you have said that in your telephone conversation with Mr. Messenger on the 17th, you said you were going to stand on the entry. Do I state your testimony correctly on that?

A. That's right.

(Testimony of Frank Etribou.)

Q. Well, now, at that time you hadn't made any entry on the \$113,000; you hadn't yet received advice of credit. What kind of entry were you going to stand on?

A. Oh, his statement that it had been mailed to us, an advice of credit.

Q. Now at that time you tell us that in the telephone conversation with Mr. Messenger, you said you would be glad to offset. As I understand you, there was no—— [345]

A. No, I didn't say that. He asked me to offset.

Q. And you said you would?

A. I said I would not—I couldn't go along with him.

Q. Oh, I see. You would not even offset. All right.

Mr. Lasky: That is all, Mr. Etribou.

Mr. Erskine: Just a second, Mr. Etribou.

Recross-Examination

By Mr. Erskine:

Q. It is a fact, is it not, that on about November the 13th, certain checks were received at your bank—that is, Saturday, November the 13th—certain checks were received at your bank drawn by Lofendo on this account which were not rejected. That is correct, isn't it?

A. Well, the statement—you mean were actually paid against the account?

Q. Well, that were not rejected on the 13th.

(Testimony of Frank Etribou.)

A. No, I am sorry. Of course I—I don't handle those items. It would be pretty hard for me to remember that from memory.

Q. Do you remember whether or not the three checks of Lofendo drawn in favor of the United Produce Company were carried in suspense for a few days until a credit was established in the account against which they were charged? Do you remember that?

A. Tarr would have to answer that. He handles that operation.

Q. Well, it is a fact, is it not, Mr. Etribou, that checks have to be rejected within a limited time in order to establish the right of the bank on which they are drawn to reject them? [346]

A. That is correct.

Mr. Lasky: Well, if the Court please, I move that go out until I get my objection in.

The Court: That may be stricken.

Mr. Lasky: That is calling for a legal conclusion. We have just entered into a stipulation that the rights to return them depends upon contract, clearing house rule or statute, and in any event, it would be a legal conclusion on the witness' part.

The Court: Isn't that the situation, counsel?

Mr. Erskine: The purpose is, your Honor, to show this, that in the conduct of a bank's business things may be in the works, as this witness says, that will affect the account. I was trying to call his attention to these three checks in suspense that were not rejected within time and therefore carried

(Testimony of Frank Etribou.)

and to be charged. Matters of that sort do not appear upon the statement, but—

The Court: Well, just show the facts, whatever the facts are.

Mr. Lasky: That will be one of the things we have got in that stipulation I am awaiting an answer on that we discussed yesterday morning. They were going to rephrase a sentence or two on that very item.

Mr. Erskine: Well, it relates to the statement of the witness with respect to matters in the work that do not appear on the account. [347]

The Court: Well, it is just a question of fact, though.

Mr. Erskine: Yes, that is right.

The Court: And the proposed stipulation covers the fact situation?

Mr. Lasky: Precisely. It is intended to.

The Court: Well, I will sustain the objection at this point.

Q. (By Mr. Erskine): Now, counsel asked you whether or not you told Mr. Messenger that you would stand on the entry, and he asked you whether or not you at that time were considering Lofendo's rights. Now in that connection I will ask you, Mr. Etribou, whether it is not a fact, as you have already testified, according to my understanding, that you had told Mr. Messenger that if he gave to Mr. LeRoy, who was coming out here, or the man who was coming out here, checks drawn by Lofendo against the account, you would do what

(Testimony of Frank Etribou.)

you could to give him preference in charging those checks against the credit? A. That is correct.

Q. That is—

A. Told him to bring them along if he had any.

Q. Yes. That you would enter the credit and if the man brought the checks along, you would charge those checks against it. Is that what you told Messenger?

A. Charge them against Lofendo's account and give him appropriate credit. [348]

Q. Yes. Now there seems to be a little dispute here, a little misunderstanding between counsel and myself, with respect to what your instructions to Tarr actually were on this, as recited on this memorandum of October the 22nd. This says that: "The matter has been taken up with Mr. Etribou, manager, and he has given instructions that we do not accept these checks for immediate credit until such time as Mr. Lofendo can be contacted and his method of operation discussed." Were those your instructions?

A. Yes, those were the instructions.

Q. You said that credit was not, checks were not to be paid against the credits until Lofendo had been contacted and his method of operation discussed, is that right? A. That is correct.

Q. Now referring to this wire, Mr. Etribou, marked Defendant's Exhibit O, I believe you have already testified that you have seen this wire?

A. That is right.

Q. I will call your attention to this statement

(Testimony of Frank Etribou.)

in the wire: "United Produce. We loaned them legal limit on secured basis." Was there anything in that statement—I withdraw that. What did you understand by that statement?

A. Well, he must be a reputable client, because they certainly wouldn't extend him that type of credit unless he was. [349]

Q. They wouldn't be loaning up to the legal limit unless he was a reputable client, is that right?

A. That's right. That is for preferred customers.

Q. Now "Net worth of company over \$80,000." Of course you understood those words to mean what they said? A. That is correct.

Q. Now, "Impossible for us—" —counsel asked you particularly about this: "Impossible for us to set limit on acceptance of their checks." Did you say that that is a customary practice with banks to put a protecting clause like that in such a wire?

A. Why, certainly.

Q. It is done frequently?

A. I couldn't state that you, as a client of my branch,—we would pay unlimited checks drawn by you, or anyone else, for that matter.

Q. The next statement is, "Checks up to present have never returned—" Oh, pardon me; "up to present have never returned any checks." What did you understand that to mean, Mr. Etribou?

A. They certainly must have had a good account and carried it in a satisfactory manner to them.

Q. That is what you understood that to mean?

(Testimony of Frank Etribou.)

A. I could not misunderstand it.

Q. Was there anything in that wire that alerted you that the United Produce Company might not be a good business risk?

A. No, I thought that they were an excellent of theirs. [350]

Q. That is what the wire led you to believe?

A. Couldn't help believing that.

Mr. Lasky: Well, I move to strike that, "Couldn't help but believe that."

Mr. Erskine: Well, leave out the "help." That is, what the wire led you to believe?

A. That is correct.

The Court: Very well.

Mr. Erskine: I think that is all.

The Court: Any further questions?

Mr. Lasky: No further questions.

The Court: Just a moment, Mr. Etribou. There is one thing that I want to understand.

Q. When Mr. LeRoy came to your branch on the afternoon of the 19th—is it the 19th?

Mr. Lasky: Nineteenth.

The Court (Continuing): —you wouldn't talk to him? A. Oh, yes, I talked to him.

Q. You wouldn't discuss the Lofendo account with him? A. That is correct.

Q. Is that the same account that you talked with Mr. Messenger on the phone about?

A. That is the same account, yes.

Q. And in your conversation with Mr. Messen-

(Testimony of Frank Etribou.)

ger, you had told him to send his man out and you would talk to him? [351]

A. With checks, and I would honor them.

Q. But when the man got there, you didn't care to talk to him?

A. Well, he was supposed to have been there the very next day. Instead, he went to San Francisco and discussed our business with the head office.

Q. And you resented him going to the head office?

A. No, sir, not necessarily. I was acting on my counsel's advice.

Q. Well, then, why didn't you talk to him?

A. I talked to him.

Q. About the account? A. No.

Q. Well, that is what I mean. Why didn't you talk to him about the account? It didn't make any difference whether you were inquiring about the weather or anything of that nature. Don't you understand what we are driving at here?

A. Yes, I understand, but I said I was carrying out my counsel's instructions.

Q. Well, your counsel told you that?

A. That is correct.

Q. And it is not because he went to San Francisco, to the central office? A. Oh, no.

Q. Then I am mistaken if I understood you to say that, that you didn't say, that the reason you didn't talk to him was because—— [352]

A. Oh, no.

Q. ——he went to the head office?

(Testimony of Frank Etribou.)

A. Oh, no, that had no bearing on it at all.

Q. The only reason you wouldn't talk to him about the account is because Mr. Schilling had told you?

A. He told me not to discuss the matter with him at all.

Q. In the conversation you had, Mr. Schilling told you that on the telephone?

A. That is correct, while he was in the office.

Q. And that is the only reason you didn't talk to him?

A. Certainly. Nothing personal about it.

The Court: That is all.

(Witness excused.)

Mr. Lasky: Now, I was prepared to put Mr. LeRoy on now, but I notice Mr. Erskine has—is this Mr. Cosgrove?

Mr. Erskine: Yes.

Mr. Lasky: From Bakersfield. And if you are eager to be sure he gets back today, I can put him on instead of Mr. LeRoy. It will only take a few moments.

Mr. Erskine: It would be a good idea all right.

The Court: Do you want to take a short period of recess at this point or finish with this witness?

Mr. Lasky: I think we can finish with this witness before three, and then we can take our recess before we go on with Mr. LeRoy, who may be much longer. [353]

Very well, come forward.

No. 13039

United States
Court of Appeals
for the Ninth Circuit.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, and EUGENE J. O'RILEY, as Trustee in Bankruptcy of the Estate of UNITED PRODUCE COMPANY, a Corporation, Bankrupt,

Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellee.

Transcript of Record
In Three Volumes
Volume II
(Pages 433 to 832)

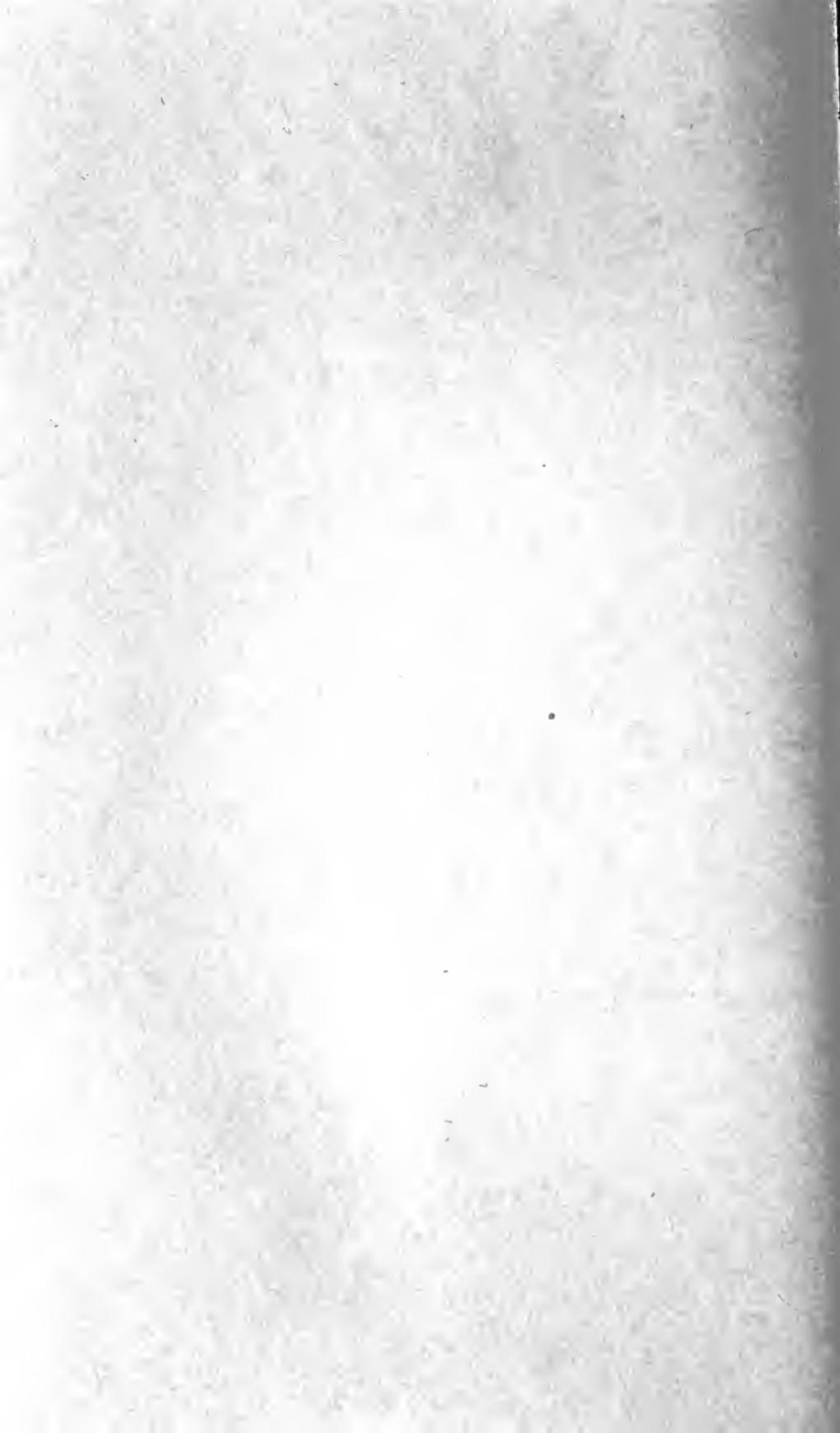
Appeals from the United States District Court,
Northern District of California,
Southern Division.

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No. 13039

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, and EUGENE J. O'RILEY, as Trustee in Bankruptcy of the Estate of UNITED PRODUCE COMPANY, a Corporation, Bankrupt,

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Transcript of Record
In Three Volumes
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Appeals from the United States District Court,
Northern District of California,
Southern Division.



JOSEPH V. COSGROVE

called as a witness in behalf of the plaintiff as an adverse witness, sworn.

The Clerk: Will you state your name to the Court, please?

A. Joseph V. Cosgrove.

Mr. Lasky: The record will show that I am also calling Mr. Cosgrove as an officer of the defendant bank.

The Court: Very well.

Direct Examination

By Mr. Lasky:

Q. Mr. Cosgrove, you are assistant manager of the East Bakersfield branch of the Bank of America, are you not? A. Yes, sir.

Q. Have been since sometime in June, 1948?

A. Yes, sir.

Q. Have been since sometime in June, 1948?

A. Yes, sir.

Q. And do you recall that Mr. Tarr—I will withdraw that for a moment. Who is Mr. Tarr?

A. Mr. Tarr is the operations officer.

Q. Of your branch? A. Yes, sir.

Q. Do you recall that he was on vacation from October 11th to October 18, 1948? [354]

A. Yes, sir.

Q. And that you were helping out on the work that he ordinarily would do during that period?

A. Yes, sir.

Q. And during that time Mr. Tarr was on vaca-

(Testimony of Joseph V. Cosgrove.)

tion, you had something to do with the Lofendo account? A. Yes, sir.

Q. And during that little period, your attention was attracted by what you considered to be unusual activity in the Lofendo account? A. Yes, sir.

Q. And this unusual activity consisted of the fact that a large number of checks in large amounts were being both deposited and checked out?

A. Yes, sir.

Q. You learned this because large items were referred to you by the bookkeeper for okay pursuant to practice of your bank branch?

A. Yes, sir.

Q. And on looking—you thereupon looked into the matter personally, did you not?

A. Yes, sir.

Q. And on looking into it, your attention was particularly attracted by the fact that checks drawn on the account were payable to United Produce Company and United Produce Checks were being deposited, [355] and you thought that fact required explanation? A. Yes, sir.

Q. So that when Mr. Tarr returned from his vacation on October 18th, you told him that you had had occasion to notice the Lofendo account, that there were a lot of checks in large amounts coming in and going out, that they were coming and going from the same parties, United Produce, and you asked Mr. Tarr if he knew anything about it, correct? A. Yes, sir.

Mr. Erskine: Asked Mr. Tarr——?

Mr. Lasky: If he knew anything about it.

(Testimony of Joseph V. Cosgrove.)

Q. Mr. Tarr said he would investigate, did he not? A. Yes, sir.

Q. And it was a few days later, then, that Mr. Tarr showed you his memorandum of October 22nd, which has been marked here as Plaintiff's Exhibit 6—no, Plaintiff's Exhibit 12, I am sorry. Is that it (handing to witness)? A. Yes, sir.

Q. And you intialed it? A. Yes, sir.

Q. To show your approval of the paper?

A. To show that I had read it.

Q. That you had read it. And then, Mr. Cosgrove, you noticed this memorandum refers to unusual operations between the two subject parties, the unusual operations were the fact that [356] Lofendo's checks were payable in such numbers and amounts to United Produce, and that United was making checks payable to Lofendo in large amounts and numbers. That is correct, is it not?

A. Yes, sir.

Q. And in fact, this fact signified to you that the account warranted further investigation?

A. There was more to it than that. The fact that we were paying some of those checks before those checks which he deposited with United had **a chance to clear.**

Q. Yes, of course. Because in honoring checks drawn by Lofendo to the order of United, your bank was relying upon checks of United to Lofendo. That's right, is it not? A. Yes, sir.

Q. And that is the sort of thing you thought required further investigation? A. Yes, sir.

Mr. Erskine: Would you speak just a little

(Testimony of Joseph V. Cosgrove.)

louder, Mr. Cosgrove? It is a little difficult for me to get everything you say.

Q. (By Mr. Lasky): Now later you personally saw Mr. Lofendo did you not? A. I did.

Q. And Mr. Rosenthal and he came into the branch one day? A. Yes, sir. [357]

Q. And was it Mr. Etribou or Mr. Tarr who brought them over to you and asked you to talk to them? A. Mr. Tarr.

Q. Mr. Tarr. And what date did that occur upon?

A. Oh, it occurred after the memorandum.

Q. Yes, and—

A. Toward the latter part of October.

Q. Toward the latter part of October, 1948?

A. Yes.

Q. And Mr. Rosenthal introduced himself to you as secretary-treasurer of United Produce Company, did he not?

A. I believe that is his title, that he gave.

Q. And at that time you had a conversation with Mr. Rosenthal and Mr. Lofendo, did you not?

A. Yes, sir.

Q. Please relate what the conversation was.

A. I believe it went along these lines, that Mr. Rosenthal introduced himself,—

Mr. Erskine: Well, pardon me. Speak just a little louder.

A. (Continuing): That Mr. Rosenthal introduced himself and stated that we had sent a communication to Frank regarding his account, and—

(Testimony of Joseph V. Cosgrove.)

Q. To Frank? A. To Frank.

Q. Referring to Lofendo? [358]

A. Referring to Lofendo.

Q. Pardon me. Go ahead, please.

A. And that perhaps he could be of assistance.

Q. Yes; will you continue?

A. So I told him that under the circumstances, that we were paying Mr. Lofendo's checks prior to their being cleared, that we wanted him to discontinue that practice; in fact, he would have to discontinue that practice. That we wanted him to give the checks a chance to clear before he drew funds against them. Also that due to the fact that the account had such large items going out, that we wanted a larger balance created.

Q. Your branch wanted a larger balance maintained at all times? A. Yes, sir.

Q. Did you say anything about twenty or thirty thousand dollars?

A. No, sir, no amount was mentioned.

Q. All right, go ahead. What else?

A. And also we wanted an explanation of the reason why checks were payable from Lofendo to United and from United back to Lofendo.

Q. And did Mr. Rosenthal give you some explanation? A. Yes, sir.

Q. What was it?

A. He gave the explanation that they were buying and selling for the account of Lofendo and that rather than carry an account on their books, they were selling on a cash basis; in other [359] words, that they made their settlement by check.

(Testimony of Joseph V. Cosgrove.)

Q. Yes, and then what else was said?

A. So I told him then that we wanted a statement on the company letterhead, in other words, a letter from United Produce, to that effect; that in order that we would have in our files a statement from them that the transactions were bona fide purchases and sales.

Q. Did he say he would give you one, give one to you? A. Yes, sir.

Q. Did he say how soon he would get it to you?

A. He led me to believe it would be forthcoming when he got back to Chicago.

Q. And that is the whole of the conversation?

A. Yes, sir.

Q. And then after they left, Mr. Lofendo and Mr. Rosenthal left, you told this conversation to Mr. Tarr, did you not? A. Yes, sir.

Q. And then you never got the promised letter?

A. That is correct.

Q. And when about ten days had elapsed and the letter still hadn't arrived, that fact completely shook your confidence in the truth of Rosenthal's story, did it not?

A. Well, it didn't happen just exactly that way. In other words, Mr. Tarr and I were discussing the matter before our officers' meeting— [360]

Q. The Officers' meeting of the 10th of November? A. Yes, sir.

Q. Yes, proceed, please.

A. And Tarr said that their account had not improved. In other words, that Lofendo was still drawing down the checks as fast as they were

(Testimony of Joseph V. Cosgrove.)

presented, and that,—so I told him that we had not got the letter, and I thought it would be best to discuss it again at the officers' meeting.

Q. Yes. And now I call your attention to your deposition, page 11, line 17, counsel.

Mr. Erskine: Let me read it with you, please? I misplaced mine.

Mr. Lasky: Certainly.

“Q. Now when you failed to get the letter from Mr. Rosenthal, did that make you doubt the truth of that story that Mr. Rosenthal had told you?

“A. It, you might say, shook my confidence.”

Is that correct?

A. Yes, sir. It did. In other words, up to that point I had complete confidence in the arrangements that they had mentioned.

Q. Yes, but after that point, when you failed to get that letter, you no longer had that confidence?

A. No, sir.

Q. You proceeded to tell Mr. Tarr and Mr. Etribou accordingly? A. Yes, sir. [361]

Q. And then the two of you said together, Mr. Tarr and you, “It looks as if we won’t get that letter, and we had better refer the matter to Mr. Etribou”?

A. Some words to that effect, before the meeting.

Q. And thereupon it was taken up at the officers' meeting of November 10th? A. Yes, sir.

(Testimony of Joseph V. Cosgrove.)

Mr. Lasky: That is all, Mr. Cosgrove.

Mr. Erskine: Just a second, Mr. Cosgrove.

Cross-Examination

By Mr. Erskine:

Q. Counsel asked you about the conversation between you and Mr. Tarr that preceded the preparation of the memorandum of October the 22nd. Plaintiff's Exhibit No. 12; do you recall that?

A. A conversation prior?

Q. Yes.

A. That one would be when Mr. Tarr returned from his vacation.

Q. Yes, when Mr. Tarr returned from his vacation, yes. A. Yes, sir.

Q. Was there anything said in that conversation with respect to an inquiry being made of the Merchandise National Bank?

A. I believe that Mr. Tarr said he would send a wire to the Merchandise National Bank regarding the account of United Produce.

Q. And do you know whether such a wire was sent? [362]

A. Not from my actual knowledge. In other words, I didn't see the wire go out, but—

Q. Did you know whether the bank got a response to that? A. Yes, we did.

Q. Yes. I will show you a wire dated October the 20th and marked Defendant's Exhibit O (handing to witness); did you ever see that wire?

(Testimony of Joseph V. Cosgrove.)

A. Yes, sir.

Q. Did you see it shortly after it came in?

A. Probably the same day or the next day.

Q. Now after your conversation with Mr. Lo-fendo and Mr. Rosenthal, did you make any inquiry of anybody with respect to the United Produce Company? A. Yes, sir.

Q. Who was that?

A. I contacted Mr. John Tozzi.

Q. Who is Mr. Tozzi?

A. Mr. Tozzi is a rancher and grower and shipper in the Bakersfield area.

Q. Is he a man that has lived in that vicinity for some time?

A. I have only been personally acquainted with him since 1948. However, I think he has lived there for quite a few years. In other words, his father lived there before him.

Q. What is that?

A. His father died, I believe, in 1947. [363]

Q. Yes. And you asked Mr. John Tozzi about the United Produce Company?

A. I asked him if he was—

Mr. Lasky: Just a moment, please; I object to any conversation that went on between this witness and Mr. Tozzi, who is not a party to this case. Certainly it can't be binding upon the plaintiff here.

Mr. Erskine: Just a question of this witness' knowledge and understanding about the United Produce Company and the information upon which he was acting. That is all.

(Testimony of Joseph V. Cosgrove.)

The Court: Well, of course, the only information upon which he could act, in any event, would be the information with reference to his financial condition in Chicago, isn't it? That is the only information that would have any bearing on the matters here.

Mr. Erskine: Well, I think—

The Court: And that is, in other words, just because information that it had bought and sold in the Bakersfield area; that wouldn't mean anything, would it?

Mr. Erskine: Well, if Mr. Tozzi told the witness that he dealt with the United Produce Company, had sold them more than \$100,000 in produce in the preceding year, that they were a good concern, that would have some bearing, it would seem to me, upon the state of mind of this witness.

The Court: Well, I don't see what it is, but I will let [364] you put it in.

Q. (By Mr. Erskine): What did Mr. Tozzi tell you?

A. Mr. Tozzi told me that he had shipped to United Produce, I believe, produce on which he expected payment in excess of \$200,000, and that he had owed him up to, I should say, \$100,000 on shipments at one time, and that their checks were all right.

Q. Mr. Tozzi was a big grower down there, was he? A. Yes, sir.

Q. When did you leave on your vacation, Mr.— A. On November 13th.

(Testimony of Joseph V. Cosgrove.)

Q. When you left on your vacation, on November 13th, did you suspect or believe that the United Produce Company and Lofendo were engaged in a kiting operation? A. No, sir.

Mr. Erskine: That is all.

Mr. Lasky: No further questions.

(Witness excused.)

The Court: The Court will stand in recess until a quarter after three.

(Recess.) [365]

ALLEN R. LeROY

was called as a witness on behalf of the Plaintiff, being first duly sworn testified as follows:

Q. Will you state your name to the Court, please? A. Allen R. LeRoy.

Direct Examination

By Mr. Lasky:

Q. What is your residence, Mr. LeRoy?

A. Evanston, Illinois.

Q. And what is your occupation?

A. Banker.

Q. With what bank are you employed?

A. Merchandise National Bank of Chicago.

Q. What capacity?

A. Executive vice president.

Q. Executive vice president?

A. At the present time.

(Testimony of Allen R. LeRoy.)

Q. How long have you been with the Merchandise National Bank?

A. Since January, 1938.

Q. During that entire period your capacity has been what?

A. Vice president or executive vice president.

Q. How long have you been a banker?

A. Since 1912.

Q. Before you came to Merchandise National Bank, with whom were you engaged?

A. Immediately preceding it I was with a firm of Brown, Harriman [366] Company for about a year. Prior to that I was with the Reconstruction Finance Corporation.

Q. For how long was that?

A. A little over two years with them.

Q. And in what capacity?

A. I was examiner in the Washington office, examiner in charge of reorganization of banks, and then the manager of the Los Angeles agency of the Reconstruction Finance Corporation, and for a short time upon organization, the Reno office of the Regional Agricultural Credit Corporation.

Q. Manager of the Regional Agricultural Credit Corporation at Reno? A. At Reno.

Q. And before that with whom?

A. Vice President of the Los Angeles Investment Company.

Q. And prior to that what was your occupation?

A. I was with the Federal Reserve Bank of Chicago.

(Testimony of Allen R. LeRoy.)

Q. For how long?

A. A little over six years.

Q. And prior to that you had been with other banks?

A. I had been president of a bank in Iowa, Manchester, Iowa.

Q. Where were you on November 17th, 1948?

A. Chicago, Illinois.

Q. Where were you the next day?

A. San Francisco. [367]

Q. How did you arrive from the one place to the other? A. Plane.

Q. You left Chicago about midnight?

A. About midnight of the 17th.

Q. When you arrived in San Francisco where did you go? I do not mean about a hotel. We can skip the hotel. But where did you go?

A. The head office of the Bank of America.

Q. Whom did you call upon?

A. Mr. Duncan.

Mr. Lasky: May I inquire at this time of counsel whether he is prepared to give us a stipulation about Mr. Duncan's position and authority that we discussed the other day?

Mr. Erskine: Well, I have thought about that, Your Honor, and I am prepared to do something like this; if agreeable to the Court and counsel. I am prepared to stipulate that if the Court finds that there was some sort of enforceable agreement made by Mr. Duncan and Mr. Kenneth Johnson with the Merchandise National Bank on November 18th, arises-

(Testimony of Allen R. LeRoy.)

ing out of the conversations of that day, such agreement shall be considered binding upon the Bank of America, subject to whatever defenses we may have as to the agreement, and that we will not challenge Mr. Duncan's and Mr. Johnson's authority to make it, but at the same time I want at least to show the facts with respect to the relationship of Mr. Duncan and Mr. Johnson to the bank and to this transaction and, the relationship of the branch to it, and the respective authorities possessed by [368] Duncan and Johnson and the branch with respect to it.

The Court: What difference does it make what those relationships are if he had authority to speak and bind them?

Mr. Erskine: It does not make any difference except as a circumstance, which I would like to have the Court consider.

The Court: How long is it going to take to show those circumstances, counsel? I do not see wasting a day's Court time on that sort of thing if in the final analysis you arrive at the conclusion that Mr. Duncan had authority to represent the bank in the manner in which he did.

Mr. Lasky: If that stipulation is granted, that is all I need. We can skip a great deal of interrogation about Mr. Duncan's authority.

Mr. Erskine: I would like to have that.

The Court: What would the color go to?

Mr. Erskine: Well, it seems to me it would have

(Testimony of Allen R. LeRoy.)

some bearing upon whether or not any commitment was actually made, whether that was the fact, but I am not going to say that if the Court finds such a commitment was made—I am not going to raise the defense of lack of authority.

The Court: Of course, that is all that counsel is interested in.

Mr. Lasky: That is all I am concerned with.

The Court: The Court has a further interest in the matter, Mr. Erskine, of conserving some time here. I appreciate that [369] sometimes counsel like to get in the color of the thing, but that is only when it affects the principal point involved. Now, if the principal point is did Duncan have authority, and the answer to that is "yes" the color means nothing to me. It can't help me any.

Mr. Erskine: I will bear that in mind in my examination of Mr. Duncan.

The Court: But it may be stipulated that Mr. Duncan in his conversations with Mr. LeRoy—

Mr. Lasky: And in the letters he wrote to Etribou.

The Court: And in the letters he wrote, had authority to represent the bank in the matters in which he held himself out to represent them?

Mr. Erskine: Yes, I will agree to that subject to my right to offer other evidence if I see fit to do so.

The Court: Is that agreeable?

Mr. Lasky: Of course, if he puts on other testi-

(Testimony of Allen R. LeRoy.)

mony which seems to detract from he has stipulated to—

The Court: It won't make any difference to me if he does. The finding will be that Mr. Duncan had authority, if counsel has stipulated to that.

Mr. Erskine: That is right.

Mr. Lasky: That satisfies me. We can skip all that stuff about Mr. Duncan's authority.

The Court: Very well. [370]

Q. (By Mr. Lasky): You say you called and talked to Mr. Duncan? A. I did.

Q. At the headquarters office of the Bank of America in San Francisco? A. Yes, sir.

Q. Did you speak to Mr. Duncan about six checks totalling \$113,216.50 drawn by the United Produce Company to the order of Lofendo which had been sent by the East Bakersfield branch of the Bank of America to your bank for collection? Yes or no. A. Yes.

Q. When you spoke to him on this subject, I suppose we should ask you who was there present.

A. Just Mr. Duncan and myself. I was sitting at his desk talking to him.

Q. What time of day when you first spoke to him on the subject?

A. I would say it was approximately ten o'clock in the morning.

Q. And you have already stated where. Will you please state to the Court, relate the conversation that occurred between you and him at that time about the six checks.

(Testimony of Allen R. LeRoy.)

Q. I acquainted Mr. Duncan with the developments in the United Produce case that afternoon before, told him that it appeared that we were the victims of a swindle, and involved in the matter were six checks totalling around \$113,000 received by us in a collection letter on which an advice of credit had been sent out; that the advice of credit had been mailed in error [371] on account of the fact that we were not familiar at the time it was mailed with the fact that the credits, which purported to show a black balance were fictitious credits, based on fictitious items, and for that reason Mr. Messenger had called Mr. Etribou at the East Bakersfield branch and informed him that the credit had been revoked, and that when I left Chicago it was with the idea of going directly to Bakersfield and pick up the items, but I found out—

Q. Pick up the which?

A. Pick up the advice of credit which had not up to that time been received by the East Bakersfield branch, according to the information which Mr. Messenger had given me the afternoon before, but that I found there was no direct connection to Bakersfield, and consequently, knowing that in the long run I would have to come to San Francisco, I stopped at the San Francisco office, central office, and immediately got in contact with them so that they would be in a position to know the full developments in the case. I told him the credit had been rescinded.

(Testimony of Allen R. LeRoy.)

Q. Did you tell Mr. Duncan how the fictitious credits had come about?

A. Not in any great detail, no, sir.

Q. To what extent did you tell him?

A. I told him that they were largely items arising—they were items drawn on the East Bakersfield branch by one Frank [372] Lofendo, payable to the order of the United Produce Company; that the information which we had received indicated they were fictitious and of no value.

Q. Did you tell Mr. Duncan how Merchandise Bank had first learned that the items drawn on the East Bakersfield branch totalling several hundred thousand dollars and concerning which you had not learned the fate were not good? A. I did.

Q. What did you tell him?

A. I told him we were first alerted by a telegram or, by the return of items, similar items, by the East Bakersfield branch the day before which had led to an investigation of the entire United Produce matter, and Mr. Messenger's call with Mr. Etribou, and in addition to that the conference with Mr. Rosenthal, in which he had admitted large discrepancies and fraudulent conduct, and our quick audit, the findings of our auditors, which were made before I left.

Q. Did you have with you when you talked to Mr. Duncan a list of checks drawn on the Lofendo account at East Bakersfield? A. Yes, sir.

Q. Of which you had not yet learned the fate?

A. Yes, sir.

(Testimony of Allen R. LeRoy.)

Q. At that time you had such a list?

A. Yes, sir.

Q. Did you show it to Mr. Duncan? [373]

A. I did.

Q. Did you have any discussion with him about the items on it? A. I did.

Q. What was that discussion?

A. I told him those were the items on which we had not received any report as of the afternoon before, and that I was very anxious to find out where they were and what their fate would be and get them back. Apparently there were no funds to pay them in East Bakersfield, and as Mr. Etribou had advised us, there would be no more deposits accepted, that there was no chance of getting them paid, and we wanted to get them returned immediately to find out what our entire situation was.

Q. What then happened after this conversation with Mr. Duncan in the morning?

A. Mr. Duncan put in a call for the East Bakersfield branch to Mr. Etribou.

Q. A telephone call? A. Yes, sir.

Q. How many telephone calls did Mr. Duncan have with Mr. Etribou on November 18th while you were present at Mr. Duncan's end of the line?

A. Two.

Q. Two? And when did the second one occur?

A. In the afternoon.

Q. Are you able to segregate in your recollection now what was [374] said in the two conversa-

(Testimony of Allen R. LeRoy.)

tions by Mr. Duncan so far as you heard the conversation?

A. Not entirely, but to a large extent. I would not want to be bound absolutely by what happened, one conversation and another. I know what happened in both of them, and I think I am quite clear as to what happened in each one.

Q. All right. You said the first telephone conversation occurred between Mr. Etribou and Mr. Duncan when? A. In the morning.

Q. And the second one in the afternoon?

A. Yes, sir.

Q. By the way, before we get into those telephone conversations, did you during the course of that day discuss other matters or any other matters with Mr. Duncan besides the six checks, the advice of credit, and the items that had been drawn on the East Bakersfield branch? A. Yes, sir.

Q. Between the first telephone conversation of Mr. Duncan with Mr. Etribou with East Bakersfield and the second one, what did you and Mr. Duncan do?

A. We went to, what they call, I think, the central office of the Bank of America, which was a transit office where all their items were collected and rerouted or sent out to their branches.

Q. Another building? A. Yes, sir. [375]

Q. What did you do when you were there, the two of you together?

A. Talked to the man in charge, or the man

(Testimony of Allen R. LeRoy.)

apparently in charge, and Mr. Duncan left a list of checks for which we were looking and asked him to ascertain their whereabouts, if they could find out whether they had been sent out to the branch or whether they were in that office, and also asked him to find out whether the advice of credit covering \$113,000 had been received.

Q. Then where did you go from there?

A. Lunch.

Q. With Mr. Duncan? A. Yes, sir.

Q. And then after lunch where did the two of you go?

A. We returned to the central office, the transit office.

Q. And what happened there?

A. They advised us as to what they had been able to find out. If I remember correctly, they had determined that a few of the checks had been sent to East Bakersfield and that others were in that office, and my impression is that they said that the credit advice had not been received.

Q. Then where did you go?

A. Back to Mr. Duncan's office.

Q. Now, you recall that sometime during the day you wrote a letter to the Bank of America right then and there in their office?

A. Yes, sir. [376]

Q. It is Plaintiff's Exhibit 10 in this case. What time of day was it that that was dictated?

A. Well, it was after we returned from lunch. I would say that it was between one and two o'clock.

(Testimony of Allen R. LeRoy.)

Q. At whose suggestion was it written?

A. Mr. Duncan's.

Q. At Mr. Duncan's? A. Yes.

Q. What was it that he said?

A. He said, "I would suggest that you outline this whole situation in a letter so that we will know the checks on which you are wanting information, and also include in that the information—or the notice that the advice of credit has been rescinded, and that will be a matter of record in our office."

Mr. Lasky: I won't reread the letter. I read one part of it formerly and the first part of it has to do with these checks, so it is not necessary to read it.

Q. After it was transcribed what did you do with it?

A. Well, when I saw it, I read it and went over it with Mr. Duncan and signed it.

Q. And gave it to him? A. Yes, sir.

Q. Will you relate to the best of your recollection what you recall Mr. Duncan saying to Mr. Etribou in the first telephone conversation that he had on that day that you were present? [377]

A. He told Mr. Etribou that I was at his desk rather than in Bakersfield on account of not being able to make the right plane connections, that he had been going over the situation with me, that I wanted to have information with respect to various checks and any developments since Mr. Messenger talked with him the afternoon before, and also referred to the fact that the advice of credit covering

(Testimony of Allen R. LeRoy.)

\$113,000 had been rescinded and asked Mr. Estri-bou whether their copy had been received.

Q. Their copy of what?

A. The advice of credit.

Q. After he had hung up did he or did he not say to you what had been said in the telephone conversation?

A. He told me that insofar as he was able to find out at the present time, the situation was practically the same as it was the afternoon before. The balance had not changed.

Q. The balance of what?

A. The balance of the Lofendo account, the credit balance, which had reported \$690 odd dollars, had not changed, but Mr. Etribou was to make an investigation and call him after lunch and find out more about the situation at that time.

Q. After Mr. Duncan hung up on the first telephone conversation, did he telephone anybody else in your presence?

A. Yes, sir, Fresno, the French branch of Bank of America.

Q. After he hung up on that telephone conversa-tion what did he tell you, if anything, about what had been said? [378]

A. He said that he had telephoned Fresno because he had ascertained from his conversation with Bakersfield, East Bakersfield, that Fresno had some dealings with the United Produce Company. In view of the situation, he wanted to know if they

(Testimony of Allen R. LeRoy.)

were alerted to discontinue any business that they might be doing with them.

Q. Will you relate what you can allocate to the second telephone conversation? [378A]

A. Yes, he told them that he had received a letter giving the list of the checks, and that a copy would be sent to them so that they could act on it and also the formal notice of the revocation of the advice of credit which was in the letter; that they would receive the letter the next day, and he also told Mr. Etribou that I was coming to Bakersfield and that I had discussed with them—with Mr. Duncan the possibility of their checking over the account with me and seeing if any of the information would be of value to us in our dealings with United Produce, and in determining our true position, and it would be all right for him to cooperate with me in doing that.

Q. Will you relate what you heard Mr. Duncan say in either of these two telephone conversations with East Bakersfield but which you were unable to allocate to either the one conversation or the other conversation?

A. In one conversation or the other he did say to whomever he was talking to at the other end—I understood it was Etribou but I have no knowledge of that, of course—"Well, that is fine and you are to be congratulated. You are mighty lucky you are in the clear."

Q. Was anything said in either of the telephone conversations about the advice of credit?

(Testimony of Allen R. LeRoy.)

A. Yes. Mr. Duncan in both of them told them that it had been revoked and that the head office was familiar with the fact. In the first one he did not say they concurred with it, but in the [379] second he said—I wouldn't say definitely that he said he concurred with it but he said it had been revoked.

Q. Was anything said about what was to be done with it, the physical disposition?

A. It was to be returned to me.

Q. To you when?

A. When I went to Bakersfield the next day.

Q. After Mr. Duncan hung up on the second conversation to East Bakersfield did he state to you what had been said to him in that conversation?

A. In the second conversation or in either one of them?

Q. In either one of them.

A. I have already, I believe, stated that apparently the East Bakersfield Branch was in the clear, that fortunately they had been alerted to the situation and were only paying against collected funds, and consequently they were all right.

Q. Did he state how East Bakersfield had been alerted? I mean did he state what was said to him as to how East Bakersfield had been alerted?

A. He told me that they had been alerted through some communications from the Merchandise National Bank of Chicago. What communication he was referring to I have no knowledge. [380]

Q. Well, now, after these two telephone con-

(Testimony of Allen R. LeRoy.)

versations had occurred, did you talk to anyone else at the Bank of America in San Francisco on that day? A. Yes, sir.

Q. With whom?

A. With Mr. Kenneth Johnson, assistant counsel, I think.

Q. Well, was he introduced to you?

A. Yes, sir.

Q. And he was introduced to you as assistant legal counsel? A. Yes, sir.

Q. Who introduced him? A. Mr. Duncan.

Q. About what time of the day was it that you saw him?

A. Approximately three o'clock. It was after I had dictated, returned from lunch, and had dictated the letter, I think. And we went up to talk to him.

Q. Was it before or after your letter was transcribed, do you recall?

A. I think it was before the letter was transcribed.

Q. After it was dictated and before transcription, according to your memory? A. Yes, sir.

Q. Now, you say you and Mr. Duncan together went to Mr. Johnson's office?

A. Yes, sir. [381]

Q. Mr. Duncan took you there?

A. Yes, sir.

Q. And did you have a conversation, was there a conversation among the three of you at that time?

A. Yes, sir.

(Testimony of Allen R. LeRoy.)

Q. Will you relate to the Court the conversation as you recall it?

A. Well, in substance Mr. Duncan outlined the situation to Mr. Johnson and said that a letter had been written giving instructions to the Bank of America to return these checks waiving presentation and protest; and also revoking the advice of credit. And saying that as a matter of formality, he wanted Mr. Johnson's approval of the situation.

Q. And what then occurred, what did Mr. Johnson say?

A. After some discussion, Mr. Johnson said, "Well, the Merchandise National Bank is entirely within their rights in revoking this credit," and he turned to Mr. Duncan and said, "You have told Mr. Etribou that the credit has been revoked——"

Q. He told him that or asked him that?

A. Well, it was in the form of a question, yes; he made it as an interrogatory statement. He says, "You have told Mr. Duncan?"

Q. I see. Go ahead.

A. Very definite. And Mr. Duncan said, yes, he had told Mr. Etribou. Mr Johnson said, "I want to telephone Mr Etribou myself, because the Bank of America will pay against that credit at their peril." Those are the words that he used. [382]

Q. Now did he telephone to Mr. Etribou or to the East Bakersfield branch? In your presence?

A. Yes, sir.

Q. And were you present when the conversation occurred? A. Yes, sir.

(Testimony of Allen R. LeRoy.)

Q. And what was said by Mr. Kenneth Johnson in that telephone conversation, as you heard it?

A. He asked Mr. Etribou if he was familiar with the situation and outlined the fact that the letter was going to come to him, that it would be all right to cooperate with me in giving me the information, and furthermore, asked him if he definitely understood. First he asked him if the advice of credit had been received. He said no. He said, "Do you understand that it is not to be acted on, and furthermore, when Mr. LeRoy comes to Bakersfield, it is to be returned to him."

Q. Anything else occur in the phone conversation that you recall?

A. No, not of any material consequence, at least, as I remember.

Q. Well, now, after Mr. Duncan—pardon me. After Mr. Johnson hung up from that phone conversation, did he say anything to you, did Mr. Johnson say anything to you about what had happened?

A. He said Mr. Etribou understood the situation.

Q. About what time of day was that? [383]

A. Well, between 3 and 4 o'clock, I would say.

Q. And then did you leave the Bank of America that day? A. Yes, sir.

Q. And did you go to Bakersfield, I mean, at any time?

A. Not that day. Yes, during the next day.

(Testimony of Allen R. LeRoy.)

Q. You went to Bakersfield the next day. How did you go there? A. Plane.

Q. Plane, and what time of the day did you arrive?

A. Well, the plane was late. I would say it was about 2 o'clock.

Q. Was it any later than 2:30 at the most?

A. I think I got to the bank in Bakersfield, East Bakersfield, just before the closing hour.

Q. Just before closing hour? A. Yes.

Q. And about what time of the day was that, for those of us who don't know closing hours?

A. Three o'clock, I think.

Q. All right. And when you got there, into the East Bakersfield branch, will you relate what happened?

A. I stood in the lobby, looked the branch over, and saw Mr. Etribou's desk was over away from the counter.

Q. Well, how do you know it was Mr. Etribou's desk?

A. Because he was pointed out to me, and I think it also—my memory is that there was a plate on his desk. But at least—

Q. All right, go ahead. I was just curious. [384]

A. I was told he was Mr. Etribou or saw his nameplate there. I knew who it was anyway. He was talking to a customer at the time.

Q. Yes.

A. And while I was standing there, I think I remember that the bank closed, and I remember

(Testimony of Allen R. LeRoy.)

then it was quiet in the lobby, and Mr. Etribou talking over the telephone and looking out in the lobby and saying, "Yes, I think he is here now."

Q. And then after Mr. Etribou hung up on that phone, did he come over to you?

A. Not until he had finished the conversation that he had with the customer that he was busy with.

Q. But did he finally talk to you?

A. Yes, sir.

Q. And will you tell us just what that conversation was?

A. He says, "I am sorry, but I can't talk to you about this Lofendo deal." And I was very much surprised, not having heard anything since I had left the Bank of America, and said, "Why not?" And he says, "Well, I just can't do it."

And he said, "There are some people coming down from the head office tomorrow. You can talk to them." I said, "May I talk to the head office on your telephone?" He said, "It won't do you any good." And then I said, "May I call a taxicab?" And he laughed and says, "Well, you don't have to do that. I will be glad to take you down town." And he did. [385]

Q. And you left the bank? A. I did.

Q. And when to your hotel? A. Yes, sir.

Q. In Bakersfield? A. Yes, sir

Q. What did you do there with respect to this subject matter?

A. I immediately put in a call for either Mr.

(Testimony of Allen R. LeRoy.)

Duncan or Mr. Kenneth Johnson at the head office of the Bank of America in San Francisco.

Q. Did you ask for Mr. Duncan?

A. Yes, sir.

Q. You get him? A. No, sir.

Q. Did you ask for Mr. Johnson?

A. Yes, sir.

Q. Who came on the line?

A. Mr. Schilling.

Q. Somebody who announced himself as Mr. Schilling? A. Yes, sir.

Q. Had you ever heard of Mr. Schilling before?

A. Not to my knowledge.

Q. And what was it that Mr. Schilling said to you on the phone then?

A. He said that he was the—I don't know whether he said [386] "counsel" or "assistant counsel." But anyway, he said that he was acting for Mr. Kenneth Johnson in his absence, and that there had been certain developments that made it necessary for them to make an investigation into the entire matter, and that somebody from their auditing department would arrive in Bakersfield the next morning who would get in touch with me. In the meantime, there was nothing else to say.

Q. And that was the phone conversation?

A. Yes, sir.

Q. And did anybody get in touch with you the next day, Saturday, the 20th of November, 1948?

A. Yes, sir.

Q. Who did?

(Testimony of Allen R. LeRoy.)

A. First thing in the morning, about 8 o'clock, I would say.

Q. Who was it? A. Mr. Lloyd Tobey.

Q. And what did he tell you?

A. Said that he was from the controller's department or the auditor's department; anyway, he was down there to make an investigation of that situation in the branch and suggested I—

Q. When you say Mr. Tobey, you refer to the gentleman seated there (indicating)?

A. I do. Suggested I come down and have breakfast with him.

Q. Was there anything further discussed about the subject matter with Mr. Tobey? [387]

A. In general, yes. Mr. Tobey told me that there had been developments in connection with the matter. I think he said what they were, that \$97,000 worth of checks, they had been notified as to the non-payment of \$97,000 worth of checks by Merchandise National Bank, and that this had made it necessary for them to get into the entire situation and determine what it was.

Q. Now did you see Mr. Etribou again?

A. Yes, sir.

Q. When was it you next saw Mr. Etribou?

A. Sunday. Sunday, the 22nd, was it? I think so.

Q. Well, taking our chronology, Sunday was the 21st. But it was Sunday?

A. It was Sunday. That was the 21st.

(Testimony of Allen R. LeRoy.)

Q. Where did you see him?

A. At the East Bakersfield branch of the Bank of America.

Q. What time of the day?

A. I think it was just about noon.

Q. About noon, and who was present then and there?

A. Well, Mr. Etribou, Mr. Tobey, the assistant supervisor of the branch of the Bank of America—his name was Libbey?

Q. Branch supervisor?

A. Yes, assistant supervisor, or—well, he was introduced to me, anyway, and Mr. Biancho.

Q. Was Mr. Biancho introduced to you at the beginning of the [388] conversation?

A. As Mr. Biancho.

Q. Yes. And after the conversation had proceeded some time, were you informed in what capacity he was there? A. He informed me.

Q. He informed you after you had been talking some time?

A. In a little while he said, "In fairness to you, I want to tell you that I am an attorney acting as an attorney."

Q. Acting—did he say he was acting on behalf of the Bank of America? A. Yes.

Q. You recall Mr. Biancho, who was in this courtroom as attorney for Mr. Mouradick at the opening of the trial; was it the same Biancho?

A. I think so. Looked familiar to me.

(Testimony of Allen R. LeRoy.)

Q. Yes. Now did you get the advice of credit?

A. I did not.

Mr. Lasky: Now, if the Court please, we have come to the other elements I was going to ask the witness about, the demands made for the return of the money at the head office when I was present on the 23rd, and I am still hoping we are going to have that whole thing with a stipulation which has been submitted to counsel for approval.

Mr. Erskine: Well, did we read that the other day?

Mr. Lasky: Yes, yes, you have it in your possession. It [389] is a very short stipulation that covers that, and a couple of other elements. I was waiting for you to give me a revise on one paragraph you said you wanted to revise.

Mr. Erskine: Yes, that is right. I haven't had a chance yet to work at that, your Honor.

Mr. Lasky: Well, then, may I reserve the right to recall Mr. LeRoy on the subject if the stipulation for some reason falls through?

The Court: Yes.

Mr. Lasky: That is the end of my direct. Your witness, Mr. Erskine.

Mr. Erskine: Well, it is practically 4 o'clock. Does the Court want me to go ahead now?

(Whereupon discussion was had among Court and counsel relative to time schedule for the remainder of the case at bar; after which the following occurred:)

The Court: Yes. Well, I think probably that will be the thing to do. If we can meet tomorrow morning and try to dispose of the plaintiff's case, aside from the question of the stipulations, tomorrow morning; and then for the benefit of counsel, take the afternoon off to work out some of these other matters, and now if that were done and you could accomplish tomorrow afternoon some of these matters, do you then think you can finish your case in the ordinary working day on Thursday and Friday? [390]

Mr. Erskine: Well, we might not be able to, but if we don't, we will extend the working day.

The Court: Yes, all right.

Mr. Erskine: I was just thinking about tomorrow. Let's start, then, at 10 tomorrow and give me the afternoon, and then on the succeeding days, if it appears necessary, we will extend the working day.

The Court: Very well, the Court will stand in recess until 10 o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10 o'clock a.m. tomorrow morning, Wednesday, June 21, 1950.) [391]

The Clerk: Merchandise National Bank v. The Bank of America, on trial.

Mr. Erskine: If the Court please, before I go ahead with my cross-examination of the witness I would like to say this: I have been thinking seriously about the course of this trial since our conversation of last evening. Mr. Lasky and the

plaintiff have been putting on their case. They are still engaged in putting on their case, and have by what is proper objection, prevented me from going into my defense upon the cross-examination of their witnesses. In addition to that, they have not only gone into their case in chief but have spent quite a bit of time in rebuttal. We have been on trial here since Thursday. This is Wednesday. Probably if we go all day today they will finish their case today, which will give them five days of trial, four and a half if you exclude the time spent in the opening statements. We, on the other hand, will probably have two days of trial which will be hurried days. That situation is not what I would like it to be. This case is important to my client, and we spent an enormous amount of labor in the preparation of it. But at the same time I want to do my utmost to get the case finished. I have tried to do that right along and I will continue to do it. But I do not want to curtail my cross-examination or curtail the presentation of my case.

The Court: Mr. Erskine, you are not going to be limited to two days if your case is not in in that time. Of course, you are going to have further time. The court has felt from the [392] start of the trial, however, that neither party has taken advantage of the Federal procedure. The procedure is developed to eliminate so many issues and to settle all those matters before trial. There are matters that the Court need not have to decide. We have spent a great deal of time, not in the trial of the plaintiff's case, but in conferences in the nature

of pre-trial conferences. Those conferences have led not only to admissions made for the benefit of plaintiff but were some of those facts that were facts that you yourself would want to prove. So what has gone on so far has not all been just for the benefit of the plaintiff.

As I say, however, I do feel that the parties have not taken proper advantage of the Federal procedure in this case. However, I am stuck with it, whether you have or you have not. I am not going to prevent any party from putting in his case. I do have the right, however, to speed it along as much as possible, and in that connection we are going to have some extended days of trial now, because I do not think it is fair to the Court to drag the matter out. I think we have only been working a four-hour day, and that is not fair to the Court.

I will tell you this: I am down here, Mr. Erskine, not for my benefit, I will assure you of that, and not for any judge's benefit down here in San Francisco. I am down here for your benefit. I am down here to help litigants who are faced [393] with crowded calendars. It does not help the judges here any for me to come down, because they are just continuing to operate in the course of the trial. They are operating the same now as if I were not here and they will continue to operate after I leave just as I had never been here. What I dispose of it rather infinitesimal, I guess, in the whole calendar that faces them. And so the only thing that I have done is inconvenience myself, at a personal cost of money, to come down and spend time. It is not fair

under those circumstances to me, I feel, for litigants to quibble about matters, not having beforehand taken the full advantage in the preparation of the case in the disposition of issues that could have been disposed of. Under those circumstances I am not going to—don't misunderstand me—I am not going to prevent you from proving anything, putting on the proof that you feel that you should prove. But in doing that, I think it is perfectly fair to all parties to say, well, of course, we are getting to the end of this matter. The time I have allotted to spend in San Francisco is drawing to a close, and so we will meet at nine o'clock in the morning, work until noon, meet at two and work until five or six and then if you are going to dispose of the case, we will work on Saturday and then we might have a night session or two. Your case is prepared before this. Spending a few hours, of course, I realize is a strain, but it is just as much a strain on my part as it is on anyone else, and I want to dispose of the matter. [394]

Mr. Erskine: Your Honor, I certainly want to help you dispose of this. I think I have not been quibbling. At least I have not tried to quibble. I think I have been trying to come along as best I can, and it may be that we did not take the full benefit of the Federal Rules in the pre-trial conference.

The Court: There are demands for admission of the genuineness of documents and other admissions of facts.

Mr. Erskine: I have a suggestion to make, and

I sort of almost hesitate to make the suggestion, but I thought about it and I know that the Court will not resent the fact that I am going to make it. I would like to go ahead all of today. What I am afraid of is, if we take this afternoon off, the first thing I know, my days of trial and cross-examination and the presentation of my witnesses will not be enough, will not be sufficient, so I would like to go ahead this afternoon and get all the testimony out of the way, if possible, before Saturday. I understand that the Court is going to attend the Judicial Conference.

The Court: I am supposed to, but I will tell you this: I am required by law to attend it, but I can be excused by the Chief Judge of the Court of Appeals.

Mr. Erskine: I was not suggesting that you be excused, your Honor. What I was going to suggest is, if you are going to be here next week—the conference is going to take place in San Francisco, is it not? [395]

The Court: Yes. [395A]

Mr. Erskine: I assume it begins at ten o'clock.

The Court: I do not think they work too hard at the conference.

Mr. Erskine: This thought occurred to me, that perhaps your Honor would permit us to go ahead and put in all the testimony we can put in up until Saturday, and if necessary go ahead on Saturday, and then next week Mr. Lasky and I can wrestle with the stipulations, the depositions, and that sort of thing, and if your Honor would be available at

nine o'clock in the morning and give us a half hour every morning, if necessary, why, I think we can dispose of it while the conference is going on.

The Court: What do you think of that, Mr. Lasky? It is a little out of the ordinary. In other words, you will be closing your case—of course, it would not be to your prejudice—perhaps with some stipulations you contemplated would be agreed to not being agreed to. That would not be to your prejudice. You could put it on. Except, of course, you would be faced with the proposition of holding your witnesses continually available while the matter is disposed.

Mr. Lasky: That is right. They have been two weeks already. It is a wonderful idea to proceed and work all day today. I also say the stipulations that remain outstanding for the plaintiff's case require no trouble at all to dispose of. There are two short ones and then the one condensing the depositions, and yesterday counsel said to the best of his impression [396] those were true and correct condensations. So far as getting his own condensations of depositions and his own stipulations, if he wants part of next week to work on them, fine, but I think we ought to make progress.

The Court: I agree, Mr. Erskine, with counsel here, that we ought to decide the action on the stipulations that have been proposed here by Mr. Lasky. It seems to me they are all matters of fact, and you have your witnesses here. It seems to me it would take just a half hour to say, "Is this not true?"

Mr. Erskine: I have to check the Gassman and Lofendo stipulations against the depositions. I believe they are all right but I want to make that check. Perhaps I do not try cases properly but I have been spending a lot of time in preparing my cross-examination and in preparing my direct examination. As a matter of fact, I was up at five o'clock yesterday morning. I was up at five o'clock this morning. I was working until seven o'clock last night. I was working until seven o'clock the night before. I have been working hard at this case and I certainly am willing to cooperate and do everything in my power, but there is an end to my physical strength. I have no doubt that these stipulations are proper and that they will go in, but I must have a little time to consider them. I do not want to walk into some hooks, to use Mr. Lasky's expression. The Court has said the stipulations were in part my stipulations. It is true they helped me out, but it [397] is also true that they are part of his case and not stipulations of my own.

The Court: Oh, yes. [398]

Mr. Lasky: I have no doubt, but I will be at your service night or day on those. Now we have outstanding in the way of stipulations one which is two pages and about eight lines, and all that I recalled counsel held it up for was a revision of a word or two in two paragraphs. I revised one paragraph according to the agreement, and it seems to me that it could be taken care of. Now the other morning in chambers counsel brought up a pro-

posed stipulation having to do with our commercial ledger sheet, and he was going to get some figures, and I have waited for him to prepare it. We were also interested in continuing the stipulation showing connection between one ledger sheet and another, and I have now finally taken it upon myself to prepare that part of the stipulation, which I will give counsel here a draft of at this time, and which follows as closely as I could remember it, word for word, what we talked about that morning. It is about two and a half pages. It doesn't take the place of that portion which he was going to draft and I still await that, but I imagine that was for his case. But for the Plaintiff's case, here is a two and a half page stipulation talking about those several ledger sheets, and I think on its fact it is patently correct, or if not, it is easily corrected.

Mr. Erskine: Well, let me see this, your Honor. I think that counsel is not as gracious as he might be. I have been trying to go along in this matter as much as I possibly can. He knows that he and I are not going to have any trouble about that [399] paragraph in that stipulation about the checks lying around the Branch. That doesn't depend upon the testimony of any of his witnesses, anyway; it depends upon the testimony of my witnesses. He knows that the Gassman and the Lofendo depositions are here, and that if we don't agree upon a summary of that testimony, he can introduce the depositions of Lofendo and Gassman. They are not here to testify. But I know we can go ahead on that. I made a suggestion that he permit me a

little time to deal with those matters, that he and I can get together, and if the court is here next week we can discuss any disagreement between him and myself on the subjects. But he insists that they go in right this minute. Now I don't think that that pressure should be brought to bear on me.

Mr. Lasky: I am sorry, I am not trying to bring pressure on you.

Mr. Erskine: After all, the fact remains, your Honor, that I will only have two days out of seven in which to present my case.

The Court: No, you are going to have all the days you need, Mr. Erskine. If it requires going over into the next week, if I cannot devote the time to next week, there will be the following week.

Mr. Erskine: Well, I am not going to do that. I want to get rid—

The Court: Your case is going to be given all of the time [400] it is necessary for you to use in the presentation of your testimony and evidence. There is no doubt about that. I am sorry if my continual urgings to speed up and that sort of thing have in any way impressed you with the idea that you are going to be limited in any manner, because you are not going to be. You are going to be given all the time you want. Of course I realize you might feel that way, but I want to disabuse your mind of it right now, because I want to get rid of this case and get out of here, don't let that influence you in whether or not you want to take additional time to do something.

Mr. Erskine: No, thank you.

The Court: There could be no prejudice against you on that basis, because I realize that you have to protect your client. You have to do everything possible to present your case. I have had too much experience, Mr. Erskine, with Judges who attempt to try cases and force attorneys to try cases the way they want them tried. I have had my full share of experience with judges of that nature, and I don't intend to be one myself if I can help it. You are going to try the case you want to try; but my position has been one of continually urging you to get together on these matters, to speed up the matter, because I do naturally want to get home to my family. I want to stop living at my expense to do Government's work and your work down here.

Mr. Erskine: I certainly want to help the Court in achieving that, and I will do the very best I can. [401]

The Court: Now you will have all the time that you need. But now on these stipulations, however, with reference to most of those facts, isn't Mr. Tobey there familiar, doesn't he know the whole history of the case sufficiently for you to sit down with him and read this stipulation over and say, "Is it or is not so?"

Mr. Erskine: Yes. Well, it is just in that one stipulation, it is just correcting that paragraph about the checks lying around the Bank. I think Mr. Lasky himself could do that.

Mr. Lasky: I have rewritten that. In fact, I rewrote it tentatively this morning, hoping we could take care of it. I rewrote it to say, "These checks

were neither rejected nor paid and were not charged against the account, but were physically kept at the Branch until November 18th." Then I threw out that line later on, and over here, "which had been at the Branch," instead of "lying around." "Which had been at the Branch." Now I corrected that line which so it is—

Mr. Erskine: That sounds as though it will be all right with me. Just a second.

(Discussion between Mr. Erskine and Mr. Tobey out of hearing of the reporter.)

The Court: Well, I think maybe, gentlemen, fifteen minutes or so in Chambers might do us some good to decide just what we are going to do. Court will stand in recess. Come into Chambers.

(Recess.) [402]

Mr. Lasky: At this time I ask that there be attached, for the record, to Plaintiff's Exhibit 14, which was a stipulation of the parties, a document entitled "Further stipulations," and counsel, you agree that we do stipulate to this document called "Further stipulations"?

Mr. Erskine: Yes.

Mr. Lasky: And that it may be part of Plaintiff's Exhibit 14.

The Court: Very well.

Mr. Erskine: That is right.

(Whereupon the document referred to above as further stipulations was received in evidence and attached as part of Plaintiff's Exhibit 14.)

Mr. Lasky: And in the body of the new addition I have inserted some Exhibit numbers, one being a document that has already been received in evidence as Plaintiff's 16 and I have marked the others as Plaintiff's Exhibits 19, 20 and 21, counsel. The rules and regulations of the Bank of America, Number 220, page 1, as Plaintiff's Exhibit 19.

The Clerk: Exhibit 19 in evidence.

(Whereupon Rules and Regulations of Bank of America No. 220, Page 1, referred to above, were received in evidence and marked Plaintiff's Exhibit No. 19.)

Mr. Lasky: And as Plaintiff's Exhibit 20, Rule 510.5, page 1. [403]

The Clerk: Plaintiff's Exhibit 20 in evidence.

(Whereupon Rule 510-5, Page 1, Bank of America, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 20.)

Mr. Lasky: And as 21, Rule No. 512, page 2.

The Clerk: Plaintiff's Exhibit No. 21 in evidence.

(Whereupon Bank of America Rule No. 512, page 2 thereof, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 21.)

Mr. Lasky: I won't read them to the Court, but my argument may refer to them for the purposes for which they are appropriate.

The Court: Yes.

Mr. Lasky: And now, Mr. Clerk, I think it might be well to staple this Further Stipulations onto the other.

The Clerk: Yes.

Mr. Erskine: May I proceed?

The Court: That comprises all of the stipulations that have now been agreed to, does it?

Mr. Lasky: They have been agreed to, to date, but, of course, one on Dean Howell's testimony. But I didn't want to break into the cross-examination on that.

The Court: Oh. Very well, you may proceed.

ALLEN R. LeROY

resumed the stand, previously sworn: [404]

Cross-Examination

By Mr. Erskine:

Q. Mr. LeRoy, I wanted to direct your attention first of all to your conversation with Mr. Duncan. You told him in that conversation, did you, Mr. LeRoy, at the beginning of it—among the first things that were said when you saw Mr. Duncan in the office of the Bank of America on the morning of the 18th—that your Bank had been swindled and was going to take a loss in connection with its transactions with United Produce Company, is that right?

A. That is right. [405]

Q. And isn't it a fact, Mr. LeRoy, that on the day prior to this—that is, on the day prior to

(Testimony of Allen R. LeRoy.)

November the 18th—you had a telephone conversation with Duncan? A. Yes, sir.

Q. You called Duncan from Chicago, did you not? A. Yes, sir.

Q. And the discussion between you and him over the telephone related to three checks that had been rejected by the Bank of America, of which the Merchandise Bank had received notice of rejection on the morning of November the 15th?

A. They had received the checks back, as I remember.

Q. Yes. But by the time you had your telephone conversation with Mr. Duncan, those checks were actually in the hands of the Merchandise Bank, is that right? A. Yes, sir.

Q. On November the 17th? A. Yes, sir.

Q. And you had a talk with Mr. Duncan about those checks over the telephone?

A. That is correct.

Q. And you told Mr. Duncan that you doubted that the Bank of America had any right to reject those checks, and it looked as though there had been too much delay in the rejection of them?

A. That is right.

Q. Now when you saw Duncan in the office of the Bank of America [406] on the morning of the 18th, you told him among the first things which were said what I have already stated: that is, that the Merchandise Bank had been swindled and had suffered a big loss in connection with United Produce transactions. That is correct, isn't it?

(Testimony of Allen R. LeRoy.)

A. I think so. I don't remember exactly the sequence in which it was introduced, but that was one of the first things mentioned.

Q. That is what I would like to get, as nearly as I can, Mr. LeRoy. I would like to get the sequence of this conversation as nearly as I can have you fix it. And the next thing that you talked about, or one of the immediate subjects of conversation, was the three checks which you discussed with him over the telephone on the preceding day. That is right, isn't it?

A. Well, that was one of the first things discussed, yes.

Q. Yes. And at that time you told Mr. Duncan with respect to those three checks that you believed that the Bank of America had acted in time in rejection of them, didn't you?

A. After his explanation was given to me, I told him that it appeared that they were in their time limit for returning them, although it was very bad correspondent bank service.

Q. In other words, Mr. Duncan explained to you what had been done with respect to the routing of the checks and the presentation of them?

A. Yes, sir.

Q. And after he had finished his explanation of that, you told [407] him that it appeared that the Bank had rejected them in time, although it didn't look to you like good correspondent bank service?

A. That is the way I remember it, sir.

Q. Now you didn't mention this particular de-

(Testimony of Allen R. LeRoy.)

tail that we are now discussing yesterday in your testimony with respect to what your conversation with Mr. Duncan was, did you, Mr. LeRoy?

A. I don't quite understand the question.

Q. You didn't refer—I will withdraw that.

In testifying yesterday, you told us what the conversation was between you and Duncan, did you not? A. I did.

Q. On the morning of November the 18th?

A. I did.

Q. And you didn't refer to this matter of the routing of those checks and rejection of them, the three checks? A. No, sir. I did not.

Q. Now—

Mr. Lasky: If the Court please, as a matter of, I might say, personal privilege, the question to the witness asked him to confine his attention to certain matters and asked for the conversation on that subject.

Mr. Erskine: I think you asked him about the conversation.

Mr. Lasky: I asked him if anything else was discussed and he said yes, and I didn't even ask him about the rest of the [408] discussion.

Mr. Erskine: I think, though—

The Court: It was asked if other matters were discussed, and he said yes, as I recall the testimony.

Mr. Erskine: It makes no difference.

The Court: It is in the record.

Mr. Erskine: I just wanted—

Mr. Lasky: Well, I didn't want the impression

(Testimony of Allen R. LeRoy.)

to be created that the witness deliberately didn't talk about something. It wasn't asked of him.

Mr. Erskine: Of course the Court will understand I am not just beating on the rock. I have a purpose.

The Court: Yes, I understand what you are doing.

Q. (By Mr. Erskine): Now, Mr. LeRoy, you and Mr. Duncan discussed at that time—before I come to that, let me just check this first. You and Mr. Duncan discussed the fact that several Lofendo checks had been received at your bank—not several, probably a good many Lofendo checks had been received at your bank—and you wanted to find out the fate of those checks. Do you remember that?

A. Yes, sir.

Q. And at that time, you had with you, did you not, a list of the Lofendo checks? Is that right?

A. Yes, sir.

Q. And you told Duncan that you were anxious to get those checks [409] back, is that right?

A. Yes, sir, and to determine the fate of them.

Q. And to determine the fate of them. And in that connection, you and Duncan went over to the central office of the bank, did you not?

A. Yes, sir.

Q. And you had a talk with a man by the name of McGoff over there?

A. As I recall it, that was the gentleman's name.

Q. And you and Duncan told McGoff that you

(Testimony of Allen R. LeRoy.)

had this list of checks and that you wanted to find out where the checks were located and determine their fate, is that right? A. Yes, sir.

Q. And you asked McGoff to make an investigation to find out where those checks were, is that right? A. That is correct.

Q. Now are you quite clear, Mr. LeRoy, that in that morning's conversation with Mr. Duncan you discussed with him the six checks, that is, the advice of credit relating to the payment of the six checks?

A. I am, sir.

Q. You mentioned you and Duncan discussed the rejection, whether or not the Bank of America had rejected the three checks in time, and you also discussed the fate of the Lofendo checks in the morning, did you not? [410]

A. That is correct.

Q. And you also, according to your recollection, discussed the advice of credit relating to the six checks? A. Yes, sir.

Q. Now as I understood your testimony, you told Duncan in your conversations with him in the morning or the afternoon, during that day, before you and he saw Johnson, that the six checks had not been paid, that the advice of credit had been sent out in error, is that correct?

A. Yes, sir.

Q. And later on you had a conversation with Johnson, did you? A. Yes, sir.

Q. And I will ask you whether or not it is a fact that you told Johnson in that conversation that

(Testimony of Allen R. LeRoy.)

a clerk in your bank had mailed the advice of credit by mistake and that it should not have been mailed?

A. That is what I advised him.

Q. That is what you told Mr. Johnson?

A. That is right.

Q. Now about when in the afternoon did you have your conversation with Mr. Johnson?

A. I would say about three o'clock.

Q. And you were accompanied by Duncan?

A. That is correct, sir.

Q. And you and Johnson and Duncan had a conference at that time? [411] A. Yes, sir.

Q. Did Duncan, before you and he went down to see Johnson, tell you that he wanted to find out from Johnson as one of the attorneys for the bank in the legal department of the bank, whether or not the Bank of America legally could return the Lofendo checks without their actual physical presentation at the branch of the bank on which they were drawn?

A. Do you mean the checks concerning which I was inquiring as to their fate?

A. That is right.

A. Yes, he said he wanted to determine from Mr. Johnson whether or not they could be withdrawn from the transit route.

Q. Without their physical presentation at the branch? A. That is correct.

Q. And Duncan told you that that is why he wanted to consult with Johnson?

(Testimony of Allen R. LeRoy.)

A. One of the reasons.

Q. Then you and he went down to Johnson's office in the building in which the main office of the bank is situated. That is correct, isn't it?

A. We went to his office. Whether it is up or down, I don't recall, sir.

Q. Now when you got down there, it is true, is it not, that Duncan outlined to Johnson the situation in which you were interested as Duncan understood it? [412] A. Yes, sir.

Q. Duncan told Johnson at that time that the Merchandise was to take a large loss in its business transactions with the United Produce Company, is that correct?

A. Correct. He said it appeared that they would, from what I had advised him.

Q. And he told Johnson that he wanted to help out; he wanted the Bank of America to help the Merchandise Bank in the situation, as far as the Bank of America could help them?

A. That is correct.

Q. Then there was a short discussion with respect to the right of the Bank of America to return the Lofendo checks without their presentation at the branch, was there not?

A. Not much of a discussion with respect to that point, as I remember it.

Q. Yes. Mr. Duncan asked Mr. Johnson whether or not the Bank of America could return the Lofendo checks to you without physical presentation to the branch, and Mr. Johnson replied that he

(Testimony of Allen R. LeRoy.)

thought that the Bank of America could do that provided the Bank of America received some sort of authorization from the Merchandise Bank authorizing it to do so?

A. That is my impression of what Mr. Johnson said, yes. [413]

Q. Then, in that conversation there was a discussion with respect to the advice of credit; that is correct, is it not? A. Yes, sir.

Q. And Johnson was told by either you or Duncan—I forget which it was according to your statement—that the advice of credit had been sent out in error because the checks had been charged against fictitious credits, is that right?

A. That was substantially the statement.

Q. That was made by you or Duncan? Which one?

A. I can't recall. Perhaps by both of us. I don't know. If it makes any difference, I will say I said it.

Q. It might have been said by either one of you, is that correct? It was at that time and in that connection that you told Johnson that a clerk in your bank had mailed the advice of credit by mistake when it should not have been mailed, is that right? A. That is correct.

Q. Mr. LeRoy, did you tell Johnson at that time that the Merchandise Bank wanted to revoke that advice of credit?

A. I said we had revoked it.

(Testimony of Allen R. LeRoy.)

Q. You said you had already revoked it, is that right? A. Yes, sir.

Q. Was there a discussion between you and Johnson at that time as to whether or not the Bank of America had the legal right [414] as against Lofendo to consent to the revocation of that advice of credit?

A. I don't recall that point being raised.

Q. Will you testify that according to your best recollection, there was no discussion along that line?

A. I don't recall it. If there was it made no impression on me.

Q. Isn't it a fact that when the point was raised, you told Johnson what you previously told Duncan, that the Merchandise Bank had been swindled by the United Produce Company, and that Lofendo was in on the swindle, and that the Bank of America did not have to pay any attention to Lofendo? A. I do not recall that.

Q. Will you state that nothing of that sort was said?

A. Not to my recollection. I do not recall the point being raised.

Q. Isn't it a fact that when you and Johnson and Duncan were discussing the revocation of the advice of credit that Johnson said to you that he, like Duncan, would do anything he could to help out the Merchandise Bank in its trouble, but he did not want to do anything to hurt his own bank, the Bank of America?

(Testimony of Allen R. LeRoy.)

A. I do not recall his making that statement, no, sir.

Q. Will you say, Mr. LeRoy, that the statement was not made?

A. If it were made, it made no impression on me. I do not recall it, sir. [415]

Q. Isn't it a fact that after Johnson had said that to you, he said that he wanted to call up Etribou down at the branch for the purpose of determining the status of the account of Lofendo at the branch in connection with this matter of the revocation of the credit?

A. Certainly if I do not recall his making a statement to that effect, it was not after that statement. He did call—said he wanted to call the branch.

Q. I was not trying to tie the two statements together, Mr. LeRoy. I was passing on to a different situation. Before I do so let me refer to something here. Let me ask you again about that. I asked you, Mr. LeRoy, whether or not Mr. Johnson did not state to you in connection with the revocation of the advice of credit that he wanted to help out the Merchandise Bank in its trouble as much as he could?

A. I do not recall his making that statement. If he did, it made no impression on me. That was not the import that I got from his statement about calling the branch.

Q. I want to refer you to page 86 of your deposition and I will you, Mr. LeRoy, whether or you

(Testimony of Allen R. LeRoy.)

did not testify as follows when your deposition was taken from about the fifth line down:

“Q. Now, in that conversation did Mr. Johnson say to you and Mr. Duncan, after Mr. Duncan had outlined the situation to him, and after other discussions had taken place, that he believed that the Bank of America [416] should do everything it could to help out the Merchandise Bank?

“A. He was cooperative, yes.

“Q. Well, I am not asking you whether he was cooperative or not, Mr. LeRoy.

“Mr. Lasky: No.

“The Witness: Then I would answer, ‘yes’ to your question, yes.”

Did you give that testimony?

A. If it is in the deposition, I did, most certainly.

Q. I will ask you again. Using that testimony to perhaps refresh your recollection, isn’t it a fact that Mr. Johnson, in that conversation, told you, after Duncan and you had outlined the situation which confronted you and him, that he would be willing to do whatever he could to help the Merchandise Bank?

A. Well, his actions certainly gave that impression. I would say the best answer to that would be the one I gave. He was cooperative.

Q. I am asking you if he said that to you?

(Testimony of Allen R. LeRoy.)

A. I do not recall his using those exact words, sir.

Q. Did he use words in substance like those?

A. It might be. He certainly was most cooperative.

Q. I paused to go back to that. Getting back to where I was, isn't it a fact that while you and Johnson and Duncan were discussing the revocation of the six checks, Johnson said in [417] substance that he did not want to give any advice respecting them until he found out what the status of the Lofendo account was, and therefore he wanted to call up Etribou, do you recall that being said?

A. I do not. That was not, according to my impression, the reason he called Mr. Etribou.

Q. Your best recollection is Johnson said nothing of that sort?

A. I do not recall his saying it now. He did say he wanted to know the status of the account.

Q. But he did say that, did he?

A. Oh, yes.

Q. And he said he wanted to call Etribou for the purpose of determining the status of the account? A. In part, yes.

Q. And it is a fact, then, Johnson called up Etribou, is it not? A. Yes, sir.

Q. And you heard Johnson's part of the telephone conversation, is that right?

A. Yes, sir, I had the opportunity. I was right there.

(Testimony of Allen R. LeRoy.)

Q. Do you recall whether or not Johnson asked Etribou over the phone with respect to the status of the Lofendo account?

A. I do not recall distinctly, I think that he did.

Q. Your best recollection is that he did, is that right?

A. I would say he probably did. [418]

Q. Then do you recall Johnson's saying to Etribou in that conversation that if the account was in the clear, that is, the Lofendo account, Johnson believed that Etribou could ignore the advice of credit?

A. I do not remember his saying anything to that effect, no, sir.

Q. You testify that he did not say anything of that sort?

A. Conditioning it on the Bank of America being in the clear, do you mean?

Q. Yes. A. Yes, sir.

Q. He did not say anything of that sort?

A. Yes, sir.

Q. Mr. LeRoy, I will ask you this: When you asked Duncan to aid you in the location of the Lofendo checks and to aid you in determining the fate of those checks, you were asking for the help of Duncan as an officer of the Bank of America, were you not? A. Yes, sir.

Q. When you asked Duncan and Johnson, and when you discussed with them the revocation of the credit, you were asking them also for the help of the Bank of America?

(Testimony of Allen R. LeRoy.)

A. In the return of the advice of credit but not in the revocation of it. That had already been done.

Q. When?

A. On the afternoon that Mr. Messenger telephoned to Mr. Estripou. [419]

Q. And then as I understand your testimony, when you were talking to Mr. Duncan and Mr. Johnson about the advice of credit, you were not asking for their help as officers of the Bank of America, were you?

A. In the revocation of the credit?

Q. No, when you were discussing the advice of credit with them and whether or not it should be entered, you were not asking them for their help in that connection, were you?

A. In the revocation of it?

Q. Not in the revocation of it, in your general discussions.

A. Certainly I was asking for their assistance.

Q. Certainly you were asking for their help in connection with the advice of credit, weren't you?

A. Yes, sir, and the return of it.

Q. Yes. Speaking generally, Mr. LeRoy, isn't it a fact that during your conversations with Duncan and Johnson their attitude with respect to your request was one of cooperation, helpfulness, that they wanted to help you; that is right, isn't it?

A. Certainly, yes, sir.

Q. And they both in fact told you that they wanted to help you as much as they could?

A. Yes, sir.

(Testimony of Allen R. LeRoy.)

Q. Now, tell me this, Mr. LeRoy: What did the Bank of America get for revoking the advice of credit?

Mr. Lasky: If the Court please, that is calling for the [420] witness' conclusion on the subject of consideration. The Court will have to pass on that, or whether it is even needed.

Mr. Erskine: It is proper cross-examination, I believe, if the Court pleases, on this ground: He was asking for their help, and my point is—

The Court: You mean did you give them anything for their help?

Mr. Erskine: Yes.

The Court: You can ask him that.

Mr. Lasky: Do you mean did he hand them anything?

The Court: Yes. That is a different matter.

Mr. Erskine: No, did the Bank of America get anything.

Mr. Lasky: That asks for his conclusion. He can testify to what he said and heard that day and what physically he did and they did.

The Court: Yes, whatever he gave them. He can only testify as to matter within his own knowledge, and then, of course, whether or not there was a revocation there, you are asking him to state a legal conclusion the Court is going to have to determine.

Mr. Erskine: That is doubtless so, but the witness has testified—

The Court: You can ask him whether he offered them anything.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: That they in effect made an agreement with him. Our position is, the Court pleases, that there was not in [421] the minds of these men, Johnson and Duncan, the idea of making any agreement. All that they were trying to do was to help this bank out that was in a jam.

The Court: You can ask him about, as to whether he gave them anything, offered them anything or anything of that nature. That is quite all right. The objection, as I understand it, went to the legal conclusion that was assumed in the question.

Mr. Lasky: Exactly. I have no objection to asking what he said or did.

The Court: Or gave him or offered him.

Q. (By Mr. Erskine): Did you offer to Mr. Johnson and Mr. Duncan anything at the time—that is, not to them personally but to them as officers of the Bank of America, and therefore to the Bank of America—anything of a valuable nature, Mr. LeRoy?

Mr. Lasky: Now, that again calls for a conclusion. What is of a valuable nature?

The Court: I think we need not worry about that. He will have to tell us what it is, and the conclusions as to whether it is of a valuable nature or not, the Court can determine. The use of the word by either counsel or the witness is not going to confuse the Court that much, I do not think.

The Witness: I did not, no, sir.

(Testimony of Allen R. LeRoy.)

Q. (By Mr. Erskine): Did you promise them anything? A. I did not. [422]

Q. After you talked with Johnson, you and Duncan returned to Duncan's office, is that right?

A. Yes, sir.

Q. Counsel in his direct examination of you called your attention to this Defendant's Exhibit 10, the letter of November 18th, and I think your testimony was, Mr. LeRoy, that that letter was dictated by you prior to the time you saw Johnson and was not transcribed until after your interview with him.

A. That is to the best of my recollection.

Q. After you and Duncan returned from Johnson's office the letter was prepared, is that right? It had been transcribed?

A. That is the way I remember it, sir.

Q. After you and Duncan had returned from Johnson's office, the letter had been transcribed, and you and he then read it, is that right, went over it?

A. That is the way I remember it, sir.

Q. And you signed it and delivered it to him?

A. Yes, sir.

Q. You delivered it to Duncan? A. Yes.

Q. Do you recall whether or not after the letter had been signed Duncan said to you that he would like to take this letter back to Johnson to have Johnson approve it? A. No, sir, I do not.

Q. Do you recall whether or not after the letter had been signed you and Duncan went back to

(Testimony of Allen R. LeRoy.)

Johnson's office so Johnson could [423] approve the letter? A. No, sir, I do not recall.

Q. Would you say that those events did not occur? [423A]

A. No, I would not. I do not recall them, however.

Q. The letter, however, was signed and delivered to Duncan, is that right? A. Yes, sir.

Q. And that completed your conversations with him, is that right? A. Yes, sir.

Q. That is, your conversation respecting these business matters? A. That is right.

Q. And as soon as that was done, you telephoned to Mr. Messenger, did you not?

A. I telephoned Mr. Messenger, and it is my impression I made the phone call from the Bank of America office, yes, sir.

Q. That is right. You made it from Mr. Duncan's desk, didn't you?

A. Or an adjacent desk there.

Q. That was about what time, San Francisco time?

A. Oh, I would say approximately four o'clock.

Q. Now, Mr. LeRoy, you now know that on November 18th, the Merchandise Bank rejected the checks presented to it through the clearings, checks of the United Produce Company, payable to Lofendo, which had been deposited with the Bakersfield Branch of the Bank of America?

A. I know now, yes, sir. [424]

(Testimony of Allen R. LeRoy.)

Q. And you now know, do you not, that the Merchandise Bank revoked those checks at about 1:30 in the afternoon of November 18th. You now know that to be a fact?

A. I have been advised on numerous and several occasions to that effect, yes, sir.

Q. And you now know and have been advised on numerous and several occasions that the man who rejected those checks aggregating the \$97,000 drawn by the United Produce to the order of Lofendo and deposited in the Bakersfield Branch, the man who gave the directions for the rejection of those checks was Messenger? A. No, that I do not know.

Q. But in your telephone conversation with Messenger at four o'clock San Francisco time, on the afternoon of November 18th, from Duncan's desk in the Bank of America, did Messenger advise you that Messenger that afternoon or the Merchandise Bank had just rejected the checks which had been deposited to Lofendo's account in the Bank of America aggregating \$97,000?

A. No, sir, he didn't advise me.

Q. He did not mention it to you?

A. No, sir.

Q. When did you first find that those \$97,000 in checks had been rejected?

Mr. Lasky: I think that is outside the scope of the Direct Examination. I thought some of this was but this is [425] certainly getting pretty far.

The Court: Overruled. Proceed.

(Testimony of Allen R. LeRoy.)

The Witness: As I remember it, the next day, late in the afternoon.

Q. (By Mr. Erskine): Who told you that they had been rejected? A. Mr. Messenger.

Q. And at that time you called Messenger from Bakersfield, is that right?

A. That is correct.

Q. Did Mr. Messenger say that he had made any effort to reach you on November 18th, or at any other time for the purpose of advising you that the \$97,000 in checks had been rejected so that you could advise the Bank of America of that fact when you were discussing the revocation of Advice of Credit? A. No, he did not.

Mr. Erskine: Would your Honor permit me a very short recess?

The Court: Surely. The court will stand in recess until 11:30. [426]

Q. (By Mr. Erskine): Now, Mr. LeRoy, in your letter of November the 18th you say with respect to the \$113,000 that it was received; you say:

“The collection letter of the East Bakersfield branch * * *,” then skipping, “contain the following checks of the United Produce Company, endorsed Lofendo (and then specifying the six checks) * * * was received by us on November 15th, and in error, an advice of credit for the items was mailed on November 16, 1948.”

(Testimony of Allen R. LeRoy.)

In other words, that is what you in effect told Johnson and Duncan before you prepared this letter, that the checks had been mailed out in error?

A. Yes, sir.

Q. I mean that the advice of credit had been mailed out in error?

A. Advice of credit. Pardon me, sir.

Q. And I believe you testified upon your direct examination that you told Mr. Duncan when you were talking with him that the advice of credit had been sent out in error, had been mailed in error, because this had been charged against fictitious credits? A. Substantially that, yes, sir.

Q. And I believe you testified on your direct examination that you didn't tell Duncan in detail why the six checks had been charged against fictitious credits, but merely that the checks had been charged against fictitious credits and that therefore the advice had been sent out in [427] error? A. Yes, sir.

Q. Now the Lofendo checks which you wanted to locate when you were talking with Duncan include the checks marked Plaintiff's Exhibit No. 4 for identification in this case, do they not (handing to witness)?

A. Well, without checking with the letter and making a determination of the fact, I wouldn't know.

Q. Yes, well—

A. (Continuing): But I will assume that they are.

(Testimony of Allen R. LeRoy.)

Mr. Lasky: Well, if we need a stipulation on it, we can check the numbers in the letter against the numbers of the checks.

Mr. Erskine: Well, that is all right; it is just a preliminary question.

Q. At any rate, Mr. LeRoy, when you came out here to California, one of the things that you were supposed to do was to locate the whereabouts of Lofendo's checks similar to Plaintiff's Exhibit 4 for identification? A. That is correct.

Q. Now did you know when you came out here to California whether the checks, the whereabouts of which you were going to locate or try to locate, had been credited to the commercial account of the United Produce with the Merchandise Bank, or whether those checks had been received as checks of debtors, checks delivered to the Merchandise Bank, with remittance sheets, as checks of debtors of the United Produce Company on [428] account of accounts receivable?

A. I didn't know at that time how they had been received or what the status of it was.

Q. Do I understand you correctly to say that when you came out here you did not know whether or not those checks, the Lofendo checks which were the checks that you wanted to find, had been credited to the commercial account or had been applied on account of accounts receivable? You did not know that? A. No, sir.

Q. Well, what were the fictitious credits, then,

(Testimony of Allen R. LeRoy.)

Mr. LeRoy, against which the six checks had been charged? A. Fictitious credits?

Q. Yes. You told Duncan, did you not, that the advice of credit had been sent out in error because the six checks had been charged against fictitious credits. That is what you have testified to, isn't it, sir? A. Correct, sir, correct.

Q. What were those fictitious credits?

A. Largely checks of Lofendo payable to United Produce Company on the East Bakersfield branch. But I did not know what their status in the Merchandise National was. I knew there were a large number of checks, Lofendo checks, which would have to be charged back, and that they were fictitious.

Q. Well, now, Mr. LeRoy, if the checks had been paid or [429] delivered to the Merchandise Bank as checks of debtors to be applied on account of accounts receivable, those checks would not create any credits to the credit of the United Produce Company, would they?

Mr. Lasky: Just a moment, please. Now we are getting into, certainly, legal argument; but in any event, it is not cross-examination of this witness. He has testified that he made certain statements in California. Now the status of what went on in Chicago we have developed by stipulation, or will, and the conclusion to be followed from there, your Honor, will decide on the facts we stipulate to or on the evidence. But it is not cross-examination of this witness, to argue with him as to whether

(Testimony of Allen R. LeRoy.)

that kind of transaction would create the fictitious credits.

Mr. Erskine: Well, if your Honor will permit me to state the purpose of it?

The Court: Yes.

Mr. Erskine: The purpose of it is this: This witness has testified that he told Duncan and Johnson at the time he asked their cooperation, according to our view of the case, to have the credit revoked; that the six checks represented by the credit had been charged against fictitious credits. That is what he says he told these men.

The Court: Yes.

Mr. Erskine: Now, I want to show, first of all, that he [430] didn't know whether they had been charged against fictitious credits or not, and secondly, that they weren't charged against fictitious credits at all, and that therefore his statement to these men was not correct.

Mr. Lasky: Well, now, the witness has testified that at that time he did not know whether they had come in into the commercial ledger or whether they had come in in the loan department.

The Court: Yes, but, counsel, isn't Mr. Erskine entitled to find out what he meant by fictitious credits?

Mr. Lasky: Oh, I think so.

The Court: Well——

Mr. Lasky: If that is the situation.

The Court: Then he develops what were the

(Testimony of Allen R. LeRoy.)

accounts, how were they handled, what did he mean by fictitious credits?

Mr. Lasky: Well, if your Honor thinks it bears on that, I withdraw my objection. It just doesn't seem to me to be bearing on that.

The Court: That is the only purpose as I see it.

Mr. Erskine: That is the only purpose: "Were there any fictitious credits?"

Mr. Lasky: The precise question was to argue with him.

The Court: Well, of course whether or not there were fictitious credits might be a conclusion the Court is going to have to draw in the end, but you can examine this witness as [431] to what he meant by fictitious credits.

Mr. Erskine: Yes.

The Witness: May I ask to have the question repeated?

Mr. Erskine: Would you read the question, Mr. Reporter, please?

(Record read.)

A. Yes, they would.

Q. Would they be credited to the commercial account of the United Produce Company?

A. Not directly.

Q. As a matter of fact, Mr. LeRoy, the checks would be applied on account of the indebtedness of the United Produce Company to the bank; that is right, isn't it? A. That is correct.

Q. Now, from time to time the United Produce

(Testimony of Allen R. LeRoy.)

Company would execute notes to the Merchandise Bank, would it not? A. Yes, sir.

Q. And those notes would be secured by assignments of accounts receivable? A. Yes, sir.

Q. And when United Produce Company would execute such a note to the Merchandise Bank, the Merchandise Bank would credit the proceeds of the note to the credit of the United Produce Company in the bank, in the commercial ledger of the bank?

A. That is correct. [432]

Mr. Lasky: Well, now, I don't want to repeat the objection, but I do wish to make the objection and ask that it run to this line as not being proper cross examination (a), and, (b) going into a field that we were stipulating on—what was done back in Chicago.

Mr. Erskine: I want to find out—

Mr. Lasky: I won't argue the matter. I just make the objection.

The Court: This is a matter that you intended to stipulate upon, as to what the facts are as to how the account was handled in Chicago?

Mr. Lasky: Yes, that is right.

Mr. Erskine: That is correct, your Honor.

Mr. Lasky: That is what we talked about this morning.

Mr. Erskine: But I want to find out what this witness meant when he told these men that six checks had been charged against fictitious credits. That is what I want to find out.

Mr. Lasky: He has said already.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: Well, he hasn't stated it to my satisfaction. I know that you would like to shut me off on this, Mr. Lasky, but I would like to go ahead with it as proper cross-examination.

Mr. Lasky: Your Honor, assign that statement that I would like to cut him off as misconduct. I have no desire to cut counsel off. [433]

The Court: Well, counsel, we are not going to get into any discussion like that. Things have gone along too nicely here for us to argue about things like that. It was not intended as any reflection upon you personally.

Mr. Erskine: Part of your technique.

The Court: Of course every lawyer wants to shut off the other side's case when he feels he has a proper objection. Now we are not going to fight about these matters. I am going to permit counsel to examine along that line for whatever it is worth.

Mr. Lasky: Yes, and I merely made the objection so it would be in the record. I didn't propose an argument.

The Court: Surely; I understand your position. Proceed.

Mr. Erskine: What was the last question? Would you read that, please, Mr. Reporter?

(Record read.)

Q. (By Mr. Erskine): Now I think just to go back here a moment, Mr. LeRoy, I think I may have asked you this before, but I want to make sure: So when the debtors' checks were received,

(Testimony of Allen R. LeRoy.)

they were applied on account of accounts receivable,
were they not?

A. Yes, sir, and endorsed on the—

Q. They were endorsed by the debtors and ap-
plied on account of the accounts receivable?

A. That is correct. [434]

Q. And when any such check was rejected by
the bank or was rejected upon presentation to the
bank on which it was drawn, then the payment
that that check had represented turned out to be a
false payment and as no payment. That is correct,
isn't it? A. That is correct.

Q. And so the effect of the rejection of the check
was to leave unpaid, the balance, the indebtedness
of the United Produce Company to which the
check had been applied?

Mr. Lasky: Isn't that calling for a legal con-
clusion? It is the same thing.

Mr. Erskine: It is for the same purpose, to find
out what he meant.

The Court: Well, yes, you are right; but in
certain matters, counsel, you can't draw a line like
that. The witness is testifying as to the handling
of the account, and of course as to whether or not
it reduced the indebtedness or not, ultimately that
becomes a question for the Court to decide, if it is
material. Now he is testifying as to what the op-
eration shows in the bank itself, as he understands
it. I don't think that we need—I will overrule the
objection. It is one of those matters that you can't

(Testimony of Allen R. LeRoy.)

so segregate the fact from the conclusion as to eliminate the conclusion.

Mr. Lasky: All right.

The Witness: I am sorry, but I would like to have the question repeated. [435]

Mr. Erskine: Would you read it, Mr. Reporter, please?

(Record read.)

A. Unless there were funds in the commercial account to which the check could be charged.

Q. Well, without coming to that step of charging the check against funds, the immediate effect of the rejection of the debtors' check applied on account of accounts receivable was to leave unpaid the indebtedness of the United Produce Company to the bank in the amount of the check?

A. No, sir, not the immediate effect.

Q. What is that?

The Court: Is this going to be covered by stipulation? This is part of the—

Mr. Lasky: Yes, your Honor.

The Court: —operation of how the account was handled in the Merchandise Bank that was to be covered by stipulation?

Mr. Lasky: The very subject of a stipulation.

The Court: Yes.

Mr. Lasky: I submitted to counsel this morning that matter, and he said that he himself was working on it and wished to defer our discussion on that

(Testimony of Allen R. LeRoy.)

until a subsequent time. That is the whole substance of that.

The Court: Now what this witness understands as to what the effect would be of that kind of an operation is of no value to us, is it? [436]

Mr. Erskine: Well, I think it might have some bearing upon his credibility. He tells these people to induce them to cooperate, let's say, in the revocation of credit, that the credit of the six checks were charged against fictitious credits; when, according to my understanding, as a banker he knew very well indeed at that time that the checks had not been charged against fictitious credits. I want to show his knowledge of the situation at the time he made that statement to these men.

Mr. Lasky: The witness has already testified that he didn't know—I mean, the—

The Court: That he didn't know the status.

Mr. Lasky: That he didn't know whether these checks had come directly into the commercial ledger or had come into another department. He has already said in his mind they were still fictitious credits. Now the procedure and legal consequence of how it was handled will be covered by stipulation, and the legal consequences will be eventually determined, if it is an issue in the case, by the Court. Now, I don't see how examining the witness on this subject bears on his credibility.

Mr. Erskine: I think it has that bearing.

The Court: You think it does? Well, if you think so, proceed.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: I am almost finished with it, your Honor. We will pass along to something else in a moment. [437] (To reporter): Would you read that last question?

(Record read.)

Mr. Erskine: Well, let me put that question to you again, Mr. LeRoy.

Q. Do you want the Court and counsel to understand that in your opinion as a banker, talking about fictitious credits, when a debtors' check delivered to the bank for application on account of accounts receivable was rejected, the effect of that rejection was not to leave unpaid the indebtedness of United Produce Company to the bank in the amount of the check?

A. Not the immediate effect. The first operation would be to charge it back to the commercial account. [438]

Q. Do you want us to understand that you charge the commercial account of the customer, and obligation of the customer to the Bank which you believe has been paid?

A. Frankly, I do not understand your question, Counsel.

Q. Well, I don't blame you. When did these Lofendo checks, the whereabouts of which you were trying to locate—when were they charged back to the commercial account of the United Produce Company with your Bank?

A. Do you mean when they were received by us?

Q. When were they charged back against the

(Testimony of Allen R. LeRoy.)

account? A. Upon their return to the Bank.

Q. When they were returned?

A. Yes, sir.

Q. Which was that November 18th?

A. Yes, sir.

The Court: That is a matter that is going to be covered in a stipulation.

Mr. Lasky: I had not known it was, but I will be glad to insert this in the stipulation, when these checks returned here from the Bank of America and when they went on the ledger sheets and the entries of reversal made. Those are physical facts.

Mr. Erskine: They are much more than physical facts; they are legal facts.

Mr. Lasky: All right, legal deductions may follow from them or may not. [439]

Q. (By Mr. Erskine): Mr. LeRoy, this still bears on the subject of fictitious credits. You are aware of the fact that the Merchandise Bank received a collection letter accompanying four checks from the East Bakersfield Branch, four checks aggregating 89,000 dollars about November 13th?

Mr. Lasky: I object to this. It certainly is outside the scope of Direct Examination, getting into another collection matter never referred to on the Direct Examination.

Mr. Erskine: I still want to cover this one point, which relates to what he meant by fictitious credits, if the Court please.

The Court: The importance of that, if you at-

(Testimony of Allen R. LeRoy.)
tach importance to the fact, the reason assigned for revoking the credit.

Mr. Erskine: That is right.

The Court: Does it make any difference what reason is assigned for the revoking of credit? If the Bank has the right to revoke, does it make any difference what reason it assigns for it?

Mr. Lasky: I do not think it makes any difference at all. It is our position that all of this is immaterial.

Mr. Erskine: If they are going to abandon their contention that there was an agreement between Johnson and Duncan on one side and the Merchandise Bank and LeRoy on the other that the advice of credit should be revoked, if they are going to abandon that contention, then I will abandon this examination. [440]

Mr. Lasky: I was not abandoning that contention. My objection was merely that this is going into a collection letter at a previous time concerning all of which there is no litigation.

The Court: Do I understand the contention is that there had to be an agreement to revoke?

Mr. Lasky: Oh, no, we do not contend there had to be. In my opening statement I said there was, but we consider it icing on the cake. We consider our rights would be just as good on a straight unilateral revocation, but in fact we have the other. That is our position.

The Court: I see.

Mr. Erskine: My contention, your Honor, is that

(Testimony of Allen R. LeRoy.)

they rely on the agreement, whether it is icing on the cake or part of the cake itself, and this gentleman's representations to our officers that induced the making of that agreement are therefore material, very material.

The Court: Very well, proceed.

(Last question was read.)

A. I know it now, yes, sir.

Q. (By Mr. Erskine): That letter was received by the Merchandise Bank according to my information—

Mr. Lasky: The stipulation put in this morning by the Bank of America refers to the Collection Letter. It says it went out from the Bank of America on November 10th and it came back collected on some given day. I think it was the [441] 16th.

Mr. Erskine: When did the advice of credit go out, do you remember?

Mr. Lasky: I think you even put the advice of credit in the other day. It is in evidence. I think it went out on the 12th; that is what the evidence shows.

Q. (By Mr. Erskine): Showing you, Mr. LeRoy, Defendant's J, I ask you whether those are not advices of credit used by your Bank and sent by your Bank to the East Bakerfield Branch of the Bank of America on the date named there?

Mr. Lasky: It has been stipulated they are.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: All right, that has been stipulated, they are.

Q. Now, Mr. LeRoy, when these advices of credit, Defendant's Exhibit J, were sent to the East Bakersfield Branch, the account of the United Produce Company with the Merchandise Bank was charged with the amount of checks referred to in them, were they not? A. Yes, sir.

Q. Were those four checks referred to in these papers here, Defendant's Exhibit J, charged against fictitious credits?

A. Yes, sir, in my opinion.

Q. Do you know whether the Merchandise Bank ever made a claim against the Bank of America for those funds?

Mr. Lasky: May I stipulate to it?

Mr. Erskine: Yes. [442]

Mr. Lasky: We never did, because the advice of credit was received by the Bank of America before we ever knew about it.

Mr. Erskine: I will take that stipulation of counsel as an answer to my question.

The Court: It is so stipulated.

Q. (By Mr. Erskine): I believe you testified, Mr. LeRoy, that in the morning of November 18th, when you and Duncan were talking, Duncan telephoned to the Fresno Branch of the Bank of America, is that right? A. Yes, sir.

Q. Are you quite clear that that was in the morning? A. As I recall it, yes, sir.

Q. You also testified that after you and Duncan

(Testimony of Allen R. LeRoy.)

had lunch together you returned to the Bank, is that right? A. Yes, sir.

Q. And that Duncan then had another telephone conversation with Etribou?

A. Yes, sir, during the afternoon with the East Bakersfield Branch, at least. I understood it was with Mr. Etribou.

Q. Did Duncan have that conversation with Etribou in the afternoon before or after you saw Johnson? A. Before, as I remember it.

Q. You have already testified that the letter of November 18th was signed and delivered after you saw Johnson; that is right, isn't it? [443]

A. As I recall, yes, sir.

Q. The conversation between Duncan and somebody in the East Bakersfield Branch whom you thought was Etribou took place before the conversation with Johnson and the letter was signed, was transcribed and signed after the conversation; that is right, isn't it?

A. As I recall it, yes, sir.

Q. Yesterday in testifying with respect to this second conversation (page 379 of the transcript, line 1) you were asked on page 378A, "Q. Will you relate what you can and what you can allocate to the second telephone conversation?"

And your reply was, "Yes, he told them that he had received a letter giving the list of the checks, and that a copy would be sent to them."

Now, as a matter of fact, when Duncan had that

(Testimony of Allen R. LeRoy.)

telephone conversation he had not received any letter, had he?

A. He may have said he was going to receive it. As I remember it, it had been dictated and was in the hands of the stenographer.

Q. Certainly at that time he had not received, had he? A. In my opinion, no.

Q. Mr. LeRoy, you testified that Mr. Duncan told you that Etribou had told him that the East Bakersfield Branch had been alerted by a communication from the Merchandise National Bank—alerted with respect to this account, is that right?

A. That was the gist of the conversation, yes, sir. [444]

Q. You are quite clear on that?

A. As I remember it.

Q. Do you know as of this time any communication from the Merchandise Bank to the East Bakersfield Branch which could have alerted the East Bakersfield Branch with respect to the Lo-fendo Account?

Mr. Lasky: This is asking for the witness' conclusion as to what letter in their files might have been construed by the East Bakersfield as an alert.

The Court: Yes, the objection is sustained.

Mr. Lasky: If there is such a document, we will argue it had that effect.

The Court: Yes, you may ask about specific letters or anything of that nature, but his conclusion as to which of the letters or communications is the one which alerted them, the objection is sus-

(Testimony of Allen R. LeRoy.)

tained to that. The Court will stand in recess until 2:00 o'clock this afternoon. [445]

Wednesday, June 21, 1950, at 2 P.M.

The Clerk: Merchandise National Bank v. Bank of America, on trial.

Mr. Erskine: I just have one more question of you, Mr. LeRoy.

Q. Mr. LeRoy, I want to find out if you told Mr. Duncan in your conversation with him on November the 18th, conversations with him, that you were anxious to get an answer to the Lofendo transactions, because "earlier in October we (that is, the Merchandise Bank) had noticed a volume of items going through there which made us suspicious, and had checked up to the best of our ability (that is, the Merchandise's ability) on the United books and obtained what appeared to be a satisfactory answer to your questions," but that in the light of disclosures made on the preceding day, November 17th, you wanted more information to determine whether or not there was a kiting operation. Did you tell Mr. Duncan that?

A. Substantially that, yes, sir.

Mr. Erskine: Well, that is all.

Mr. Lasky: No further questions, Mr. LeRoy.

The Court: Very well, you may step down.

(Witness excused.)

Mr. Lasky: Mr. Duncan.

Mr. Erskine: Pardon me. I understood, of

course, that I [446] have a right to recall Mr. LeRoy as part of my own case.

The Court: Oh, yes, yes.

Mr. Lasky: He will be here.

ROLAND T. DUNCAN

called on behalf of the plaintiff as an adverse witness, sworn.

The Clerk: Will you state your name to the Court, please?

A. Roland T. Duncan.

Mr. Lasky: Mr. Duncan is being called as an adverse witness under Rule 43(b).

The Court: Very well.

Direct Examination

By Mr. Lasky:

Q. Mr. Duncan, you are vice president of the Bank of America, are you not?

A. Berkeley Office, yes.

Q. Well, presently you are over at the Berkeley office? A. That is right.

Q. But in November, 1948, you were assistant vice president in the Banks and Bankers Division of the Administrative Department at the headquarters office in San Francisco, correct?

A. That's right.

Q. And that is the division that has to do with relations with correspondent banks? A. Yes.

Q. Do you recall that on November 18, 1948, Mr. LeRoy of the [447] Merchandise National Bank

(Testimony of Roland T. Duncan.)

called upon you at your office in San Francisco?

A. Yes.

Q. And at that time Mr. LeRoy told you, did he not, that his bank had sent out an advice of credit for \$113,000-odd to the East Bakersfield branch, that that had been sent out in error, that the checks involved had not been paid and that the advice of credit should not be acted upon when received?

A. He told me that on the 18th; on the 18th he told me practically that, yes.

Q. Yes. And subsequently, during the day and in his presence, you telephoned to your East Bakersfield branch?

A. I telephoned East Bakersfield. Whether Mr. LeRoy was there or not, I am not sure. But I did telephone.

Q. Well, Mr. LeRoy saw you in the morning and he saw you again in the afternoon, did he not?

A. That's right.

Q. And you two had lunch together this day?

A. I didn't recall it, but he says we did, and I guess we did.

Q. But in any event, it was sometime during the course of the day and sandwiched in between conversations with Mr. LeRoy that you you did call Bakersfield, East Bakersfield? A. Yes, I did.

Q. And you had a telephone conversation with one of the officers of the East Bakersfield branch, did you not? [448] A. Yes, I did.

(Testimony of Roland T. Duncan.)

Q. Who was it, was it Mr. Etribou?

A. On the 18th, I don't know whether it was Etribou. I know I did talk to Mr. Tarr.

Q. All right, and at that time in the conversation, Mr. Tarr, told you, did he not, that Merchandise National Bank had had a telephone conversation the previous day telling his branch not to act on the advice of credit, that it had been sent out in error, that the checks had not yet been paid? Mr. Tarr told you that?

A. No, I wouldn't recall that.

Your Honor, I made a memorandum shortly after this transaction, and I would like to be able to refer to it to recall my memory, if I may.

Q. (By Mr. Lasky): Now with respect to that memorandum, I will ask you a few questions about that before you refer to it. That memorandum that you refer to was not made by you until December 1st, 1948, is that right?

A. That is when it is dated, yes.

Q. Which was about two weeks after your conversation with Mr. LeRoy?

A. Approximately.

Q. And you did not make that memorandum until you had been advised that it looked like a lawsuit was pending with Merchandise National Bank?

A. No, that is not true. [449]

Q. You knew at that time that Merchandise National Bank had already made demands for the return of the money on deposit with your bank?

A. I might have.

(Testimony of Roland T. Duncan.)

Q. Had you not been told before you made the memorandum that Mr. LeRoy had come back to see Mr. Schilling with an attorney representing the Merchandise National Bank?

A. I knew that he had come back and had seen Mr. Schilling, yes.

Q. So that when this memorandum was made two weeks later, you already anticipated that something was about to happen in the way of a litigation?

A. Not necessarily, no.

Q. You made the memorandum in anticipation of—

A. No, I made it in anticipation, in the normal procedure of my operations.

Mr. Lasky: I suggest, if the Court please, that I be permitted to interrogate the witness without the benefit of his memorandum, and when I have exhausted his memory on the subject, he has a right to refer to it.

The Court: He has no right to use a memorandum in any event until his memory has been exhausted.

Mr. Lasky: Yes.

Q. Now, getting back to the question I asked you just a moment ago, did Mr. Tarr tell you in the phone conversation that Merchandise National Bank had a telephone conversation the [450] previous day with Tarr's branch, telling them not to act on the advice of credit that had been sent out in error, and that the checks had not yet been paid? Do you remember that?

(Testimony of Roland T. Duncan.)

A. He could have told me that, yes.

Q. Well, I call your attention to your deposition—Counsel, page 53. Your deposition was taken in this case? A. Yes.

Q. And I read you at line 15:

“Tarr, as I recall it, told me of the telephone call that they had the previous afternoon from the Merchandise National Bank asking them not to act upon an advice of credit which they said had been sent out in error, and that the checks involved under their collection had actually not been paid. And he told me at that time that, as I recall it, they had not as yet received the advice of credit.”

You testified to that, of course, at the time?

A. I testified to that.

Q. Which was about six months ago?

A. Yes.

Q. Your memory was better at that time than now?

Mr. Erskine: Well, now, counsel, I think that the deposition shows that he was testifying from his memorandum. “Let the record show that I am showing the witness the memorandum again,” on line 5 of page 53. [451]

Mr. Lasky: It doesn’t make any difference. The record may show that he was testifying from his memorandum.

Q. In any event, that is correct, is it not?

A. That I testified to there? Yes.

(Testimony of Roland T. Duncan.)

Q. Yes. And you recall that you and Mr. LeRoy called on Mr. Kenneth Johnson of your legal department sometime during the course of the November 18th? A. We did.

Q. And at that time it is a fact that Mr. LeRoy did tell Mr. Johnson, is it not, that Merchandise National Bank had in error sent out an advice of credit covering \$113,000-odd of checks that had been sent out by East Bakersfield to Merchandise for collection, that the checks had not been paid, that the advice of credit had been sent out in error and that Bank of America was to disregard the advice when it got it and not act upon it?

A. In substance, yes.

Q. Yes. And also that East Bakersfield branch was not to make entries or accept the advice of credit when received?

A. He requested that, yes.

Q. Yes. And he said, did he not, Mr. Duncan, that his bank expected your bank not to act on that advice of credit?

A. He was asking us not to act on the advice of credit.

Q. Yes. He said that they expected you would not do so?

A. Whether he expected us to do so or not I wouldn't know. [452] He stated it that way.

Q. Well, that is the substance of it, was it not?

A. That is the substance.

Q. Without searching your memory for the exact words? A. Yes.

(Testimony of Roland T. Duncan.)

Q. And then it is a fact, is it not, that Mr. Johnson in the presence of you and also in the presence of Mr. LeRoy did telephone to Mr. Etribou?

A. He did.

Q. And talked about the \$113,000?

A. Part of it, yes.

Q. Yes, sir. And it is a fact that he told Mr. Etribou in that telephone conversation that the Bank of America was to follow LeRoy's instructions on the subject of the advice of credit?

A. No, I wouldn't say that.

Q. Did he not say that?

A. Not to definitely follow them, no.

Mr. Erskine: I can't quite hear you.

The Court: "Not to definitely follow them, no."

Mr. Erskine: Thank you.

Q. (By Mr. Lasky): I show you here a letter that has been marked in evidence as Plaintiff's Exhibit No. 11. Will you look at that, please? That is your signature, is it not?

A. That is right. [453]

Q. You remember writing that letter?

A. Yes, I do.

Q. That day? A. Yes.

Q. And mailing it? A. Yes.

Q. Now you notice this statement:

"During our telephone conversation this afternoon with Kenneth M. Johnson, assistant counsel of your legal department, you were informed of our bank's position in this case, namely, we must recognize their instructions."?

(Testimony of Roland T. Duncan.)

A. That's right.

Q. Now refreshing your memory from that letter which you wrote shortly after the telephone conversation—is that right?

A. Later in the afternoon.

Q. Yes. Refreshing your memory from that letter, then, it is a fact, is it not, that Mr. Kenneth Johnson in the phone conversation with Mr. Estribou did tell him that the Bank of America was to follow LeRoy's instructions?

A. He told him that they, that we wanted to assist LeRoy in every way that we could in connection with that advice of credit, and he wanted Estribou's cooperation in doing it if he possibly could.

Q. Will you explain how it happens that you do not put those qualifications or you did not put the qualifications in that [454] letter which you wrote immediately thereafter?

A. We wanted the full cooperation from Estribou that we could possibly get in doing anything possible to save what might be losses as far as the Merchandise National were concerned.

Q. You wanted to—had you finished your answer?

A. Save any losses which they might be involved in, in connection with this particular transaction.

Q. You wanted to cooperate with the Merchandise National Bank did you not?

A. Definitely.

Q. Merchandise National Bank at that time was a valued customer of yours, was it?

(Testimony of Roland T. Duncan.)

A. They were good customers of ours.

Q. They were carrying an affirmative balance with your bank of anywhere from \$300,000 to \$400,000 at any one time, weren't they?

A. I don't think it was quite that high.

Q. Well, it was certainly in excess of \$250,000?

A. From \$200,000 up.

Q. You considered that a very valuable account?

A. Good account.

Q. You wanted to retain the good will of the Merchandise National Bank? A. Naturally.

Q. Retain their business? [455]

A. Yes.

Q. Which was profitable to you?

A. I imagine so.

Q. You certainly told Mr. LeRoy at that time after investigating it throughout your bank in San Francisco and by telephone with East Bakersfield that the advance of credit had not yet been received, did you not?

A. Did I tell Mr. LeRoy that?

Q. Yes; did you not?

A. Not to my recollection.

Q. Your deposition, Mr. Duncan—Mr. Erskine, page 41, line 17:

"Did Mr. LeRoy ask you when he came in in the morning or did he ask you at any time during the day that he was there whether the advice of credit had yet been received by Bank of America?

"A. As I recall it, in the afternoon.

(Testimony of Roland T. Duncan.)

"Q. And when he asked you that, what did you do, if anything? A. Answered it.

"Q. What did you tell him?

"A. As I recall, I told him that it hadn't been received."

Now that is the fact, is it not? You did so tell him?

A. If I told him that, from that deposition, yes, in the afternoon. You state that I was told by Tarr and by telephone [456] conversation that it hadn't been received. Then I recited to him that it hadn't been received.

Q. Well, of course, Mr. Duncan, I am not telling you anything about the facts; I am asking you.

A. Well, that is what I said there in the deposition—that is it.

Q. And it is the truth as you recall it?

A. As I recall it, yes.

Q. Yes. Now after you remember typing your letter, writing your letter that we have just referred to, Plaintiff's Exhibit 11, you also remember receiving from Mr. LeRoy this letter, which has been marked in evidence Plaintiff's Exhibit 10 and which I show you (handing to witness)?

A. Yes, I do.

Q. Now, after you wrote your letter, Plaintiff's Exhibit 11, is it not a fact that you took both letters to Mr. Kenneth Johnson and showed them to him?

A. I possibly did.

Q. Well, it is a fact that you did, is it not, ask him to look them over?

(Testimony of Roland T. Duncan.)

A. Well, as I say, I don't know whether I did. I was counselling with him and I no doubt would.

Q. Well, I call your attention to your deposition, page 44, line 23. I will go back to line 19, where I am referring to the letter: [457]

"Q. Did you dictate the letter?

"A. I must have.

"Q. And after you wrote it, what did you do with it?

"A. The usual procedure would be to mail it.

"Q. Did you show it to Mr. LeRoy before you mailed it?

"A. I don't recall, but I wouldn't be surprised if I did.

"Q. Did you show it to Mr. Johnson?

"A. I believe I did.

"Q. Did you say anything to Mr. Johnson about this letter?

"A. Not that I recall.

"Q. For what purpose did you tell Mr. Johnson you were showing it to him?

"A. It is the usual procedure if you are going to counsel on anything at all that you would follow through on the remainder of your transaction.

"Q. Did Mr. Johnson say anything about the letter to you?

"A. Not that I recall now.

"Q. Did he say it was all right to send it out? A. He must have.

"Q. You don't recall?

(Testimony of Roland T. Duncan.)

"A. I don't recall his exact words as to that.

"Q. Well, no, if you can't remember exact words, of course that is all right. But do you recall in substance what he said to you?

"A. No, I don't." [458]

You have no recollection at all of, after you showed this to Mr. Johnson, what he said about it?

A. No, I haven't, other than— [458-A]

Q. (By Mr. Lasky): But you did show it to him?

Mr. Erskine: Wait a second. He did not quite finish his answer.

Mr. Lasky: All right, if he didn't finish it.

The Witness: Other than I must have showed it to him.

Q. (By Mr. Lasky): On November 17—that is the day before Mr. LeRoy arrived—you talked by telephone to both Etribou and to Tarr, did you not? A. I did.

Q. At that time both of them told you that they had been watching the account of Lofendo for sometime and had not been advancing anything against uncollected funds and were in the clear?

A. That was the substance of it, yes.

Q. On the morning of November 19th—that is the day after Mr. LeRoy was there—slightly before 9 a.m. Mr. Tarr telephoned you, did he not, from East Bakersfield?

A. As I recall he did, yes.

Q. By the way, dropping that for a moment,

(Testimony of Roland T. Duncan.)

when you talked to Mr. Etribou on November 17th, he told you that they had been concerned with the Lofendo account for sometime in the past, did he not?

A. My conversations with Etribou at any time were very short and brief. The comments that he made were to the effect that they had been concerned about the account, but so far as any [459] details are concerned regarding the items I was talking specifically about, they were carried on with Tarr. So my conversations with Etribou, were, you might say, just passing conversations because they were very brief.

Q. I understand that, but the fact is Etribou did tell you at least this much, that for sometime past they had been concerned with the Lofendo account and had been keeping a close eye on it?

A. In substance, yes.

Q. Getting back to the phone conversation you had with Mr. Tarr on the morning of November 19th early in the morning just about the time the bank opened, is that right?

A. We get there at eight o'clock, so any time after that.

Q. You get there earlier than lawyers get to work.

Mr. Erskine: Some lawyers.

Mr. Lasky: I accept the correction, Mr. Erskine, Mr. Erskine is a lark and I am an owl, I am afraid.

The Witness: Yes, it was before nine o'clock.

(Testimony of Roland T. Duncan.)

Mr. Lasky: Tarr telephoned you?

A. That is right.

Q. He told you then that he had just received a wire from the Continental Illinois National Bank and Trust Company of Chicago stating that they were returning items totaling in excess of \$97,000 issued by United Produce Company, and that those revealed that the East Bakersfield Branch had accepted [460] these items for deposit on November 15th and had paid against them; do you remember that?

A. That is it in substance.

Q. He stated that they desired to act on the advice of credit in excess of \$113,000, is that right? They desired to act upon it?

A. They wanted to act upon the advice of credit, if they were going to accept those items back.

Q. But had not yet got it?

A. They had not yet got the advice. That is what he told me.

Q. He called you early in the morning and said on account of that wire from the Continental Illinois National Bank, they wanted to take advantage of the \$113,000 but they had not yet got the advice of credit?

A. As I recall it.

Q. What you did was to tell him to get in touch with this branch supervisor, didn't you?

A. Assistant branch supervisor.

Q. And his assistant branch supervisor was a man named Libby?

A. That is right.

Q. You told him to get in touch with Libby and find out what to do?

A. That is right.

(Testimony of Roland T. Duncan.)

Q. You said in turn you would go down and tell the whole story to Mr. Kenneth Johnson?

A. I most likely did. [461]

Q. And then you proceeded to tell several other people in the bank about it—Mr. Reed, the cashier——

A. Mr. Reed, the cashier.

Q. Mr. Kenneth Johnson? A. Yes.

Q. And several others, including Mr. Libby, who was in the head office at the time. That is all.

Cross-Examination

By Mr. Erskine:

Q. Mr. Duncan, in one of the questions that Mr. Lasky put to you he asked you whether or not, as I remember the testimony, LeRoy had told you to not act upon advice of credit. Do you recall whether LeRoy had expected or that he was requesting the Bank of America not to act upon the advice of credit? [462]

A. As I recall it, he was asking us not to act upon the advice of credit.

Q. He was requesting you not to?

A. Requesting us not to act upon it.

Q. LeRoy in these conversations with you was asking your help. He was not laying down any law to you, was he?

Mr. Lasky: That calls for the witness' conclusion as to the meaning of the conversation.

Mr. Erskine: I will withdraw the question.

The Court: Very well.

Q. (By Mr. Erskine): Mr. Lasky asked you

(Testimony of Roland T. Duncan.)

about your reasons for giving the instructions to Etribou or for writing the letter to Etribou in which you, in effect, instructed him—Do you have that letter?

Mr. Lasky: Yes (handing a document to Mr. Erskine).

Q. (By Mr. Erskine): Withdrawing that question, in this letter you say you were informed of our bank's position in this case, namely, we must recognize their instructions, and you were asked your reasons for doing that. What was your answer to that question? I hadn't quite got the reason that you gave.

A. My main purpose was to cooperate with LeRoy in doing what we possibly could to help in every way to eliminate what he had told me looked as if there was going to be a sizeable loss, and in cooperating we wanted to make it as emphatic with Etribou that we wanted him to do everything possible to give that [463] cooperation. Mr. LeRoy's letter contained more than just this advice of credit that you were talking about. There were other transactions involved.

Q. Before you wrote that portion of the letter which I have quoted did you have a talk with Mr. Etribou with respect to the status of the Lofendo account?

A. As I recall my conversation with Etribou—

Q. With Tarr? A. I did with Tarr, yes.

Q. What had you been told about the status of the account?

(Testimony of Roland T. Duncan.)

A. At that particular time Tarr told me the account seemed to be all in the clear and it looked as though they had a black balance.

Q. And did you tell that to Mr. LeRoy at any time?

A. I must have told him at the time I was talking to Tarr.

Q. Could that have been one of the reasons underlying the portion of the letter of November 18th to Etribou which I have quoted?

Mr. Lasky: I think I will object to that, asking him what was the reason for the statement in the letter.

Mr. Erskine: I think it is cross-examination. You asked him for the reason.

The Court: I think you asked him, didn't you, counsel, as to the reason why he had made the statement.

Mr. Lasky: If both the Court and counsel recall that I did, I withdraw my objection.

The Court: I so understood. [464]

Mr. Erskine: I have a note down here.

The Witness: May I have that?

The Court: I do not think it is a question, counsel, as to whether it could have been one of the reasons. I think it would be more in point if it was or was not one of the reasons.

Q. (By Mr. Erskine): Was it or was it not one of the reasons underlying the instructions or the statement quoted from your letter, that is, that Tarr

(Testimony of Roland T. Duncan.)

had told you at that time that the account was in the clear?

A. The account at that time was in the clear and they had a black balance and it looked to be from the way things were at that particular moment they were not going to suffer any loss at Bakersfield.

Q. Was that not one of the reasons?

A. That was one of the reasons, one of the main reasons.

Q. Mr. Duncan, to go over the story as briefly as we can so as to give a complete picture of it, did you have a telephone conversation with LeRoy on November 17th, the day preceding the day on which you saw him at the bank? A. I did.

Q. What was that telephone conversation about?

Mr. Lasky: I object to that as outside the scope of the direct and not proper cross.

Mr. Erskine: It is part of the circumstances of the conversation, your Honor, about which the witness was interrogated. [465]

Mr. Lasky: I asked him nothing about the subject matter of the conversation.

Mr. Erskine: I know, but do you want me to call Mr. Duncan back tomorrow or the next day or shall we go along and try to get rid of him today?

Mr. Lasky: If you put it on the basis of convenience and using him as your witness now on your case, it is all right with me.

Mr. Erskine: It is proper cross-examination, too.

The Court: I do not see how offhand it is proper cross-examination. It is a different conversation

(Testimony of Roland T. Duncan.)

and had prior to any conversation that was inquired into on direct examination.

Mr. Erskine: It leads up, it is preliminary to what took place on the 18th, your Honor.

The Court: If it is going to speed things up, I will overrule the objection. Proceed.

A. My telephone conversation that afternoon, Mr. LeRoy called me——

Q. (By Mr. Erskine): That is the 17th?

A. That is the 17th, to inform me that the Merchandise National were refusing to accept back three items that had been returned by our East Bakersfield branch, and the reason being what he considered and what their bank considered was unnecessary delay in presentation.

Q. That was your telephone conversation with LeRoy on the 17th? [466]

A. On the 17th.

Q. You saw him on the morning of the 18th at the bank in San Francisco?

A. On the morning of the 18th, when I was placing a telephone call for him in reply to his telephone conversation the previous afternoon, he walked into the office.

Q. Between the telephone conversation of the 17th and when you saw him on the 18th did you make inquiry about the three checks?

A. I had one of the officers check the routing of those three checks.

Q. When Mr. LeRoy came into to see you on the morning of the 18th what did he tell you in the first

(Testimony of Roland T. Duncan.)

place? How did the conversation between you and him begin, do you recall?

A. As I recall it, the first part of the conversation related directly to our telephone conversation of the previous afternoon, and that he had with him the three checks, and that there had not been a delay in the presentation of them, that they been routed properly, and the return was in order, and consequently they were going to accept the three items back.

Q. Now, I will ask you, Mr. Duncan, did you make a memorandum of your conversation with LeRoy relating to the incidents of November 17th, 18th and 19th?

A. Pencilled memorandums, which you always do, like telephone conversations and things of that nature—you would have to, because of the amounts, dates and names. [467]

Q. Did you later on after these dates dictate a typewritten memorandum of what had taken place?

A. I did.

Q. When did you dictate that, Mr. Duncan.

A. Well, from what it says there, December 1st, and it was dated December 1st.

Q. That is the date the memorandum bears, is it?

A. Dictated from pencilled memorandums and from memory at that particular time.

Q. Did you prepare that particular memorandum with a view toward this lawsuit or was it a part of the routine of your office to prepare such memoranda?

(Testimony of Roland T. Duncan.)

A. We prepared memorandums on every contact that we had at our office and every contact that we made in the field when we were out calling, and those went into the files. That was the only method we had of being able to keep everybody in the department informed as to what transpired between our correspondent relationships.

Q. It was part of your regular routine to prepare this memorandum?

A. Part of the routine.

Q. Did you dictate it personally?

A. I did.

Q. Did you consult with anybody when you were dictating it? A. No. [468]

Q. Did you consult with anybody after the dictation was completed? A. No.

Q. Did you prepare a draft, a proposed memorandum and then a final draft? A. No.

Q. You accumulate these, and as time presented itself, you dictate a bunch of them at a time. That one happened to be December 1st. There might have been a half dozen others along with it.

Mr. Erskine: I will ask that this be marked for identification.

Mr. Lasky: If the Court please, before that—

Mr. Erskine: This is a preliminary question I am about to put to him, and then you can make your objection.

(The document referred to was thereupon marked Defendant's Exhibit P for identification.)

(Testimony of Roland T. Duncan.)

Q. (By Mr. Erskine): Showing you this Defendant's Exhibit P for identification, I will ask you, Mr. Duncan, was that the draft originally dictated by you or did you prepare on draft and then upon the basis of that prepare another?

A. No, just the one.

Q. This Defendant's P for identification is the draft as dictated?

A. As dictated for the file.

Mr. Erskine: Now, if the Court please, I believe the [469] witness can, if necessary, if his recollection is not clear without the memorandum, refer to the memorandum.

Mr. Lasky: Will the Court permit me one further question of the witness with respect to this memorandum?

Q. I asked you before whether it was not a fact that you realized that a lawsuit was coming when you prepared that memorandum, and I do not recall now what your answer was, but I want to direct your attention to page 50 of your deposition, Mr. Duncan, line 4:

“Q. Now, on December 1st, when you prepared that memorandum, had anybody advised you yet that Merchandise National Bank was protesting the debiting of the \$113,000 against its account?

“A. Oh, I might have been aware of it. I wouldn't recall.”

(Testimony of Roland T. Duncan.)

and then that was changed when you signed the deposition to read as follows: "Yes, I knew of it."

It is a fact, is it not, when you prepared that memorandum you knew the Merchandise National Bank was protesting the debiting and charging of that \$113,000 item against its account?

A. I knew possibly it was protesting but I did not know there was going to be any legal action, which you mentioned to me before.

Q. But you did, of course——

A. I knew at that time it had been protested, yes. [470]

Q. The Merchandise National Bank, represented by an attorney, had already been in touch with your bank on the subject? A. That is so, yes.

Mr. Lasky: I submit to the Court the memorandum prepared after a controversy has arisen, a matter of two, two and a half weeks, is not a proper memorandum with which a witness is to refresh his memory.

The Court: I do not recall, counsel, the mere fact that the mere fact that the controversy has arisen and he knew it had arisen at the time he made the memorandum creates a situation that requires the Court to prevent the use of the memoranda.

Mr. Lasky: Of course, I may be in error of my understanding of the rules of evidence, but a document prepared in circumstances of such a character as to detract from the veracity or credibility of the witness, prepared with an eye——

(Testimony of Roland T. Duncan.)

The Court: That is a different proposition though.

Mr. Erskine: It might go to the weight.

The Court: That is your theory of it. He has testified it was made in the regular course of his business. Now, all the facts surrounding it and the testimony he gives will then be weighed by the Court, and under all those circumstances, and the Court finds, after all the evidence is in, as to what the document was prepared for.

Mr. Lasky: Very well, but in the next place, of course——

The Court: He has to exhaust his memory [471] first.

Mr. Lasky: Yes, he ought to exhaust his memory.

The Court: Yes. He has not yet done that.

Mr. Erskine: What was the question?

The Court: I do not think there was a question. I think you just made the statement that from this point forward he could refer to the memorandum, but that is not so. [471A]

Q. As I understand the ruling of the Court, so I will be clear on the point, if you have a memory with respect to any fact for which a question calls, without reference to your memorandum you should state what your memory is; if you have any recollection with respect to such a fact, you can consult the memorandum if your memory is not present with respect to the fact. Now, Mr. Duncan, I will ask you whether or not at the time you first talked

(Testimony of Roland T. Duncan.)

to Mr. LeRoy there was any conversation between you and him with respect to a kiting operation going on in the Merchandise Bank in connection with this United Produce account and whether or not the Merchandise Bank was to take a loss in connection with that operation?

A. Yes, there was. The Merchandise Bank would take a loss and anticipated—as if there was going to be a loss, possible loss.

Q. Then, Mr. Duncan, there was a discussion with respect to the routing of the three checks, is that right, the presentation of the three checks?

A. That was brief. That was disposed of promptly, as far as those three particular checks that the telephone conversation had dwelled on the previous afternoon. Because Mr. LeRoy told me immediately—

Q. Well, I don't think you have got to tell us what the law is. Perhaps we will be able to find that out. But at any rate there was first of all the discussion with respect to that [472] subject?

A. Yes.

Q. Then was there anything said with respect to the location of certain checks which had been delivered to the Merchandise Bank?

A. Many checks, a number of checks.

Q. What was said with respect to that particular phase of the matter?

A. Mr. LeRoy had with him a number of memorandums including adding machine tapes and totals, pencil memorandums, covering various items; and

(Testimony of Roland T. Duncan.)

as he told me, that they had uncovered what they thought was a large scale kiting operation between the Produce Company and Lofendo, in Bakersfield, and possibly other accounts in other Banks in the East; and that he was primarily interested at this particular moment to find out the location and the present disposition of all these items that were somewhere in transit, if not already present at our Bakersfield Branch.

Q. And what did you say to that, Mr. Duncan?

A. I assured him that we wanted to help in every way that we possibly could—would certainly give him full cooperation and that we would endeavor to locate these items and find out where they were.

Q. And what did you do, what did you and LeRoy do with respect to that matter?

A. We visited our central office and saw Mr. McGoff down there, [473] asked him, gave him the background of the story, asked him if he would mind tracing these items. I don't know how many there were.

Q. You and Mr. LeRoy went down to this office?

A. Both Mr. LeRoy and myself.

Q. And talked to Mr. McGoff down there?

A. That is correct.

Q. And asked McGoff to try and find those items?

A. Find the present location of those items.

Q. What is that?

A. Find the present location of those items.

(Testimony of Roland T. Duncan.)

Q. Did you later get a report from McGoff on that subject?

A. During the afternoon we got a report from him.

Q. And did you receive the report?

A. As I recall it, I eventually got the report; whether I got it direct from McGoff or through one of our other officers. I think it came through Lou Allen, I am not sure.

Q. And did you communicate what you had learned on that subject to Mr. LeRoy?

A. I did.

Q. Now, Mr. Duncan, did you have a conversation with anybody in the Bakersfield Branch on November 17th?

A. I talked to both Etribou and Tarr on the 17th.

Q. That conversation related to the, whether or not the three checks had been properly presented or had been rejected in time, [474] I mean?

A. I phoned them after I had received the telephone call from Mr. LeRoy on the 17th.

Q. And to discuss that subject with them?

A. To discuss those three items.

Q. Yes. Now, did you have any other telephone conversations with Etribou or Tarr on the 18th, according to your best recollection?

A. I recall that I talked to Tarr. I might have talked to Etribou as well, but again, it was just brief. I talked primarily with Mr. Tarr.

(Testimony of Roland T. Duncan.)

Q. And what was your conversation with Mr. Tarr?

A. Tracing down some of these items which we had been tracing, which Ed McGoff had been tracing for us, to find out the present disposition of those, if they had been to Bakersfield, what the condition of the account was at that moment.

Q. Was anything said in that conversation with respect to the advice of credit for the six checks?

A. It could have been, yes.

Q. Now, after your conversation with Tarr, did you have a conversation with LeRoy?

A. Yes, he could have been right there at the desk as I recall.

Q. And what is your recollection as to what you told him? Did you tell LeRoy what Tarr had told you?

A. Told Mr. LeRoy that at the moment the account in Bakersfield [475] looked to be all in the clear, in the black, and they looked to be perfectly all right and no problem there as far as any loss was concerned.

Q. Now, later on in that afternoon, you and Mr. LeRoy saw Mr. Johnson?

A. That is correct.

Q. Mr. Kenneth Johnson?

A. That is right.

Q. Who was with the legal department of the Bank at that time, is that right? A. Correct.

Q. And you and Mr. LeRoy had a talk with Mr. Johnson at that time? A. We did.

(Testimony of Roland T. Duncan.)

Q. Can you tell us in substance what that conversation was, Mr. Duncan?

A. The conversation with Johnson was, Mr. LeRoy wanted to give me a letter of instructions relative to those checks that we had traced down, that Ed McGoff had traced down that morning.

Q. That is, the checks that McGoff was trying to find out where they were?

A. Yes. He wanted to give me a letter of instruction requesting us to return those checks directly back to Merchandise National without going to their destination for presentation. My request of Johnson was to find out our legal rights in returning items [476] that had not been presented at the Branch drawn on, and not protesting them. Mr. LeRoy wanted the items returned as rapidly as possible and without any further delay, and if we could stop them in San Francisco or stop them at any other point and return them immediately, they would be in their hands in Chicago, so that they could act upon them if necessary. And my conversation with Johnson was, could we accept a letter from LeRoy giving us instructions to return these items without having the items presented and protested in the Bakersfield Branch?

Q. Now, when you saw Mr. Johnson, you told him what you just stated, is that right?

A. That is true.

Q. And didn't you tell him anything with respect, in general, to the position of the Merchandise Bank in the United Produce situation?

(Testimony of Roland T. Duncan.)

A. We summarized what had transpired up to that point, and—

Q. What did you say in that connection?

A. Well, I told him of my conversation with LeRoy—I mean, with Tarr, that I had talked to them and the account was all clear, and—

Q. Did you say anything with respect to what LeRoy had told you about the loss by Merchandise in United Produce transactions?

A. That came into the conversation. I talked about that.

Q. What did you say about that?

A. That Mr. LeRoy had informed me that they had uncovered what [477] looked like a large scale kiting operation, not only covering the Produce Company account and Lofendo, but possibly others and other banks in the East.

Q. Now, was there any discussion at that time with Mr. Johnson with respect to the advice of credit? A. Yes, I think there was.

Q. What was said in that connection, Mr. Duncan?

A. Well, that discussion was more between Mr. Johnson and Mr. LeRoy.

Q. You heard it, did you?

A. I heard it. I was there.

Q. What is your best recollection as to what was said in that connection?

A. That Mr. LeRoy wanted us to not act upon the advice of Credit, stating that it had been sent out in error and that the checks had not been paid.

(Testimony of Roland T. Duncan.)

Mr. Johnson wanted to cooperate with him, told him, I believe, that if we could safely not act upon the advice of credit, we would do so, to protect them, as long as we ourselves wouldn't suffer any loss on the account in Bakersfield.

Q. Did Johnson say that he wanted to call up Etribou and find out what the situation was with respect to the account before he acted on the suggestion respecting the advice of credit?

A. He did.

Q. And did he call up Etribou at that [478] time? A. Yes, he did.

Q. Now, tell us what you heard of the conversation; that is Johnson's part of it. What did he say to Etribou as you recall it, Mr. Duncan?

A. Well, as I recall it, he told Etribou that both Mr. LeRoy and I were there at that particular time, that we had traced down a number of items that Mr. LeRoy was interested in, found their present disposition. We were asking him, or Johnson asked him, again as to the condition of the account, whether they had any good funds and whether they had any items out for collection whether any possibility of funds being made available through collection existed. I think that is about the substance, along those lines.

Q. And after Johnson got finished with the conversation, what did he report to you and LeRoy as to what had been said by Etribou?

A. As I recall it, he said that as of the moment,

(Testimony of Roland T. Duncan.)

Etribou said that everything was in the clear, it looked perfectly all right and that if the conditions layed that way—but Etribou had emphasized to Johnson, and Johnson told us first, that—

Mr. Lasky: Well, just a moment. I move to strike the statement that Etribou emphasized something.

Mr. Erskine: That can go out.

The Court: It may be stricken.

Mr. Erskine: What did he tell you? [479]

A. Johnson told us that he, Etribou, had told him that though the account looked in the clear at the moment, that there were so many items in transit that anything could happen.

Q. But he did report to you that Etribou had stated that at that time the account was in the clear?

A. It was in the black, yes.

Q. Was anything said in this conversation between LeRoy and Johnson that you can recall with respect to the right of the Bank of America not to enter the credit?

A. Yes, there was some discussion on that as to the right—if the credit got into, I believe, the hands of Lofendo, Lofendo should get access to the funds, I believe there was some discussion on that. But just the details, I wouldn't recall.

Q. Now after this conversation with Johnson, what happened then?

A. We went back, Mr. LeRoy and I went back to my desk and the letter was completed then.

(Testimony of Roland T. Duncan.)

Whether or not it had been started before or not, I don't know.

Q. The letter that you refer to is Plaintiff's Exhibit 10? (Handing to witness.)

A. Yes, that is it.

Q. That letter was completed then and signed by Mr. LeRoy? A. That is right.

Q. And it was delivered to you?

A. Correct. [480]

Q. What did you do with it at that time, do you recall, Mr. Duncan?

A. As I recall it, Mr. LeRoy and I again visited Ken Johnson's office.

Q. And did you submit the letter to Mr. Johnson? A. I believe we did, yes.

Q. Mr. LeRoy was there?

A. Mr. LeRoy, as I recall it, was with me, yes.

Q. And what did Mr. Johnson say?

A. I don't recall exactly what he said.

Q. Did he say, did he indicate that he approved of the form of the letter?

A. Indicated that it was o.k.

Q. That it was o.k.?

The Court: The letter dictated, signed by Mr. LeRoy? Exhibit 10, is it?

Mr. Erskine: Yes, your Honor, I am quite sure it is 10.

Mr. Lasky: I thought he was referring to the other.

Mr. Erskine: That isn't the Exhibit 10.

Q. And then did you prepare this letter or about

(Testimony of Roland T. Duncan.)

this time did you prepare the letter, Plaintiff's Exhibit 11, to Mr. Etribou, you recall?

A. I prepared it in the afternoon, yes.

Q. Did you submit that letter to Mr. Johnson too? A. I could have. [481]

Q. What is your best recollection of that?

A. I just don't recall.

Q. Calling your attention, Mr. Duncan, to Plaintiff's Exhibit 11, you are quite sure that you dictated that in the afternoon after you finished talking with Johnson?

A. Yes, because I dictated, I would dictate it after I had received Mr. LeRoy's letter.

Q. Yes. This says at the end of it—withdraw that.

Did you have a talk that day with the Fresno Branch respecting the United Produce Company?

A. Yes, I believe I did.

Q. When did you have that talk with the Fresno Branch, what time of day?

A. As I recall it, in the afternoon of the 18th.

Q. The last sentence of that letter said, "For your information I have just finished talking to our Fresno office, and everything appears to be in the clear there." Does that line which I just finished quoting refresh your recollection as to the hour at which you talked to the Fresno Branch upon that subject?

A. Well, it can't have been much before I wrote the letter. I mean, it would be approximately at that time, just prior to that.

(Testimony of Roland T. Duncan.)

Q. Just prior to writing the letter?

A. Sure.

Q. That is your best recollection as to [482] when? A. Well, it must have been.

Q. Well, I am just asking you. What is your best recollection on that subject? Did you talk to the Fresno Branch shortly prior to the time you wrote the letter, or sometime prior to that?

A. No, it would be just before, just before.

Q. Did you at any time in the conversations with Etribou on that day tell Etribou that the advice of credit had been revoked, the telephone conversation? A. Did I tell Etribou?

Q. Yes. A. No.

Q. Do you recall whether or not Johnson, in talking with LeRoy told LeRoy that the Merchandise Bank was entirely in the right in revoking the advice of credit? A. I don't recall that.

Q. What is your best recollection as to whether or not something of that sort was said?

A. My recollection is that Johnson agreed to go along in doing what we could, again, to cooperate and help Merchandise National. He was asking Etribou to not act upon the advice of credit and asking for his cooperation.

Q. Did you ever tell Mr. LeRoy that Mr. Etribou had told you that the Bakersfield Branch had been alerted with respect to the Lofendo account by a communication the branch had received from the Merchandise National Bank? [483]

(Testimony of Roland T. Duncan.)

A. I did not.

Q. Did the Bank of America, Mr. Duncan, receive anything from the Merchandise Bank or from anybody else, in connection with this transaction between LeRoy and the Bank of America concerning which you have been testifying?

A. Not to my knowledge.

Q. Did it or did it not?

A. I would say no.

Q. At that time I believe you stated that you were Assistant Vice-President of the Bank of America, working in the Bank and Bankers division of the Bank? A. Correct.

Q. Is that right? A. Correct.

Q. And what was included in the functions of that department, Mr. Duncan?

Mr. Lasky: Now—

Mr. Erskine: Just one or two questions.

The Court: He has already agreed that he had authority to make any—

Mr. Erskine: Just one or two questions.

A. Banks and Bankers Department is a division of the administration department. Their duties were primarily servicing and soliciting correspondent bank accounts, servicing correspondent banks. It was the public contact, public relations end of it. [484] We would call on and solicit and work out arrangements for handling of prospective correspondent's business on the West Coast here and then pass that along to the operating department who would work out the details.

(Testimony of Roland T. Duncan.)

Q. It was a public relations job largely, was it?

A. When you are traveling on the road as much as we did, you are, public relations work.

Q. Now, is it a fair statement to say that in your conversations with Mr. LeRoy on November 18th, you, as a representative of that department of the Bank, were doing what you could to help out a customer? A. That is correct.

Mr. Erskine: That is all.

Mr. Lasky: Just a couple of questions.

Redirect Examination

By Mr. Lasky:

Q. Mr. Duncan,—

The Court: I have some questions I would like to ask.

Mr. Lasky: Yes.

The Court: In the Bank of America, when one department of the Bank decides to do something, do they then have to ask the cooperation of another department? Is that the customary procedure? I mean, in the Bank of America, this is the Headquarters, and if they decide to do something, do they then ask the Branch Manager if he will do that? Is that the way it works?

A. Depending on what the matter is at that particular time, the [485] Branch Manager has pretty good authority in his own Branch.

Q. Is he independent?

A. To a large degree. He is following a standard practice, but to a large degree he operates on

(Testimony of Roland T. Duncan.)

his own authority, which is invested in him as a Branch Manager.

Q. Well yes, but now is he independent? I mean, if the Bank of America at the central office, or the President or the Vice-President or the Chairman of the Board, whoever is in charge of a particular department of a Bank,—if he tells the Branch Manager something, what does the Branch Manager do, say, "No, I don't agree with you"?

A. Many times.

Q. And refused to do it?

A. If he thinks it is within his right, his power vested in him, the Branch Manager, yes, he will refuse to do it, and it comes to a head after that.

Q. It comes to a head after that?

A. I say, it might come to a head. It depends on the nature of the subject. He might win or he might lose.

Mr. Lasky: Might lose his job, too?

The Witness: Well, he could, but not very often. [486]

The Court: Well, that is what I wanted to get at. I understand the situation.

The Witness: It depends on the subject.

Mr. Lasky: I assume our stipulation about authority is still binding?

The Court: Oh, yes.

Mr. Lasky: We won't have to go into this matter at all, then.

The Court: Oh, yes, I was just curious pri-

(Testimony of Roland T. Duncan.)
marily as to how these things operate in these bigger institutions.

Mr. Lasky: I would add to "curiosity," "incredulousness."

Q. (By Mr. Lasky): But now, Mr. Duncan, you have testified on examination by your counsel that you do remember having taken Mr. LeRoy's letter to Mr. Johnson, correct?

A. That is correct.

Q. And you remember distinctly that Mr. Johnson okayed Mr. LeRoy's letter, correct?

A. Yes, I would say that.

Q. But you say you don't remember having taken your own letter to your counsel to get his approval?

A. I said I didn't recall it, but no doubt I could have.

Q. Yes. And it is a fact, is it not, that you not only could have—you did; you asked him for his suggestions, he said he had none whatever and you sent out your letter?

A. That could possibly be. [486A]

Q. Well, it is, is it not, the fact?

A. You are asking me to say that I know definitely it is a fact, and I don't recall definitely that it was definitely the fact; but I will say that it very easily could have been, and possibly was, because I was counselling with him.

Q. Yes. Somehow, what happened to your own letter escapes your memory, but what happened to Mr. LeRoy's does not?

(Testimony of Roland T. Duncan.)

A. We went to Mr. Johnson for the purpose of accepting Mr. LeRoy's letter, not mine.

Q. All right. Now, of course, you have already said you sent out your letter, wrote it and sent it out to Mr. Etribou after all these conversations were over, after you finished talking to LeRoy and Johnson?

A. That would be the time that it would be sent, yes.

Q. Yes. Now, you have also testified that when Mr. Johnson, you and Mr. LeRoy, were talking, and on the telephone conversation from Mr. Johnson to Bakersfield there was a discussion about legal rights. Did you so testify?

A. I believe I used the term "legal rights." I might have.

Q. Well, I think your counsel did and you said yes. Now, it is a fact, is it not, that Mr. Johnson said to Mr. Etribou, and he also said in your presence and to Mr. LeRoy that if any credit was given to Lofendo and he was permitted to draw out funds on that \$113,000, the Bank of America would be acting at its peril?

A. Well, I don't recall that. [487]

Q. Isn't that the substance of what was said, if you don't recall the words?

A. I said there was conversation, but as to its acting at its peril, I certainly don't recall that.

Q. Well, you recall only to this extent, that there was discussion of what would be the legal rights if Lofendo got his hands on the funds, is that right?

(Testimony of Roland T. Duncan.)

A. There was discussion as to what would be the legal rights of wherever those funds went.

Q. Now, you have also said and there was discussion to the effect—let me withdraw that.

It is a fact, is it not, that Mr. Johnson had telephoned to Mr. Etribou, and in that conversation said that Etribou was to ignore the advice of credit when it arrived and when that advice of credit arrived through the mail, he should not make whatever entries he would usually make on an advice of credit?

A. As I recall, he asked us not to act upon the letter of credit, if he was all in the clear, which Etribou had indicated to him he was. But as Etribou also indicated to him, from what Mr. Johnson told us afterwards, the fact that though he was in the clear at the moment, with so many items in transit, he didn't know what the outcome was going to be.

Q. Well, Mr. Duncan, at that time you had already talked to Bakersfield the day before; you have testified to that? A. Yes. [488]

Q. And you had been told that for some time they had been keeping an eye upon the Lofendo account, correct? A. Correct.

Q. And that for some time they had been paying out only against collected funds, correct?

A. Correct.

Q. And you were told that again when you talked to Tarr on the 18th, correct?

A. It could be, yes.

(Testimony of Roland T. Duncan.)

Q. Well then, who raised the possibility that instructions at Bakersfield had been violated and that there was any possibility at all that there might an if involved about the East Bakersfield being in the clear?

A. As far as I am concerned, as far as I recall, it would be Frank Etribou.

Mr. Lasky: That is all. No further questions.

Recross-Examination

By Mr. Erskine:

Q. You are a branch manager yourself, aren't you? A. I am.

Q. Managing the Berkeley branch?

A. Correct.

Q. And can any branch manager, in view of the number of items passing through an account, and the accounts of the bank and the number of transactions involved in a branch in one day, know the exact status of any account from the records of the branch? [489]

Mr. Lasky: Well, I won't object.

A. No, it would be impossible in practice.

Mr. Lasky: I am willing to stipulate that bankers can be taken frequently by swindlers, one way or another.

Mr. Erskine: Surely.

Mr. Lasky: No matter how careful they may be.

Mr. Erskine: Surely. And mistakes are made, with a great number of items passing through a bank in any day; and sometimes the checks are not

(Testimony of Roland T. Duncan.)
rejected in time, sometimes some of the technical
rules are not complied with.

All right, that is all, Mr. Duncan.

The Court: Very well.

(Witness excused.)

The Court: Off the record.

(Off the record discussion.)

The Court: Very well, Court will stand in recess
until twenty minutes after three.

(Recess.) [490]

Mr. Lasky: Mr. Tarr, will you take the witness
stand, please?

IVAN N. TARR

was called as a witness on behalf of the plaintiff,
sworn.

Mr. Lasky: I am calling Mr. Tarr under the
privilege of the Federal Rules as an adverse wit-
ness.

Direct Examination

By Mr. Lasky:

Q. Mr. Tarr, you are assistant cashier and chief
clerk at the East Bakersfield branch of the Bank
of America, are you not? A. Yes.

Q. You have been such for approximately four
years? A. Yes.

Q. You are what they call the operations officer
of that branch? A. Yes.

Q. Do you recall having dictated this memo-

(Testimony of Ivan N. Tarr.)

random? I show you Plaintiff's Exhibit 12 in this case. Do you remember preparing that?

A. Yes.

Q. Do you remember preparing the later one, Plaintiff's Exhibit 13, dated November 15th?

A. Yes.

Q. Now, Mr. Tarr, as operations officer of that bank you used to open the mail that came into the branch, did you not? [491] A. Occasionally.

Q. Including envelopes containing items for deposit in the Lofendo account? A. Yes.

Q. You did open many such?

A. That is right.

Q. In this manner you learned originally of the facts which appear in the memorandum which you prepared, Plaintiff's Exhibit 12, the memorandum of October 22nd?

A. What was that question?

Q. You learned the facts which appear in this memorandum? A. Yes.

Q. You learned of the unusual operations between United Produce Company and Frank Lofendo? A. Yes.

Q. And you learned of the fact that there were so many large checks coming into the account from United Produce Company to Lofendo and so many large ones going out from the account to United Produce account? That is correct?

A. As a result—it came to my attention first of the large items being paid against his account and the large deposits being credited.

(Testimony of Ivan N. Tarr.)

Q. You referred in this memorandum to unusual operations, the facts that you thought were unusual were the activity in the account, the large items, and the fact that the checks were [492] payable to United Produce, and many deposits were checks of United Produce—those were what you thought were unusual?

A. Yes, that is unusual.

Q. At the time you prepared this memorandum of October 22, 1948, at the beginning of business of that day, October 22, 1948, your branch, the East Bakersfield branch, was entirely in the clear with respect to the Lofendo account, was it not?

A. Yes, I believe so.

Q. You had collected funds there and you had paid out nothing against uncollected funds?

A. I believe so.

Q. And then it was, with that condition of affairs, with the branch in the clear, Mr. Estripou instructed you that the branch was not thereafter to give credit to the Lofendo account on any items until they had been collected, until after Lofendo had been contacted; that is so, isn't it?

A. Well, it was not in the exact wording. It was to withhold credit on the items until such time as the items would have a reasonable length of time to clear.

Q. Following this memorandum of October 22, 1948, you did not then defer giving credit to the Lofendo account until items were actually collected, did you? A. Until that time?

(Testimony of Ivan N. Tarr.)

Q. After that time.

A. After that time? [493]

Q. Yes. You did not entirely refrain from giving credit to the Lofendo account until checks were collected? A. I believe we did.

Q. Beginning at a later time, shortly after the 22nd, isn't it a fact that from October 22nd, at the time you wrote this first memorandum until November 10th, instead of your branch refraining from giving credit on items until they were collected, you followed an entirely different practice of giving credit, but putting on the credit on the ledger sheet a hold to permit holding checks up from being drawn against it for a period of two or three days?

A. That is an ordinary practice.

Q. I did not ask you whether it was ordinary or not. I asked you whether that was what you did?

A. That is right.

Q. But on November 10, 1948, ten days after Mr. Rosenthal came into your branch with Lofendo, you decided to go upon a much stricter conduct of that account, isn't that right?

A. That is my instructions.

Q. I understand they were instructions, and you talked everything over with your manager, Mr. Etribou, before you proceeded with those instructions, didn't you? A. That is right.

Q. My question is, beginning on November 10th, everybody in the branch after discussion at an

(Testimony of Ivan N. Tarr.)

officers' meeting decided to put [494] the Lofendo account on a much stricter basis?

Mr. Erskine: Just a second, if the Court please. That calls for the conclusion of the witness as to what is much stricter and what is less strict. I think it would be better to ask him what was done.

The Court: Well, yes. This is another one of those things, seems to me. It is like asking a witness whether or not a person is drunk. They say yes, and then they have to describe what leads them to believe that. It is one of those things. The facts will have to be developed.

Mr. Lasky: I will withdraw the question, because it is not worth taking time upon. I will put it another way.

Q. Beginning on November 10th, you decided, you, Mr. Etribou, and the other officers at your officers' meeting, that instead of passing immediate credit to the Lofendo account on any items that came in and then holding them with a tab or tag for a few days before permitting withdrawals, as you had been doing since October 22nd, from that time, November 10th, on you would not enter credit at all until and unless you actually got collection on the items; that is true, isn't it?

A. That is right.

Q. It was you who about October 22nd, telephoned to Mr. Dean Howell at Mazzie Farms asking the whereabouts of Mr. Lofendo, was it not?

A. Yes. [495]

(Testimony of Ivan N. Tarr.)

Q. You told Mr. Howell you were looking for Mr. Lofendo?

A. I asked Mr. Howell if he knew where he could reach Mr. Lofendo.

Q. Now, Mr. Tarr, returning your attention to the collection item of \$113,216.50, you remember when that item came into the bank on November 13th, you did send it out by a collection letter?

A. Yes.

Q. You never sent to Lofendo or addressed to Lofendo at any address whatsoever any copy of the collection letter or any copy of the advice of collection, did you? A. No.

Q. You remember on the night of November 18th, you received a wire from the Continental Illinois National Bank of Chicago concerning the rejection of some checks for \$97,000. You remember that, do you not? A. Late afternoon.

Q. It came in, the evidence has been stipulated to, about 4:45 and decoded about 5:15 or thereabouts. Now, do you remember that the next morning you telephoned to Mr. Duncan at the Banks and Bankers Division of the headquarters office in San Francisco? A. Yes.

Q. And you told Mr. Duncan, did you not, that the advice of credit on the \$113,000 had not yet come in and you wanted [496] permission of the head office to use the advice of credit and take advantage of it when, as and if it arrived?

A. No.

Q. You do not remember that?

(Testimony of Ivan N. Tarr.)

A. I remember that. Did you ask me if I remembered it or if that was true?

Q. I will ask you both questions. Do you remember it and is it true? A. It is not true.

Q. What was the telephone conversation?

A. I called Mr. Duncan and advised him that we had received this wire from Merchandise National Bank that they were rejecting the items totaling \$97,000, and in the conversation I stated that we were going to take credit on the \$113,000. I do not remember the exact amount.

Q. Have you finished your answer? I do not want to interrupt you. A. That is all.

Q. You are quite sure when you spoke to Mr. Duncan, what happened was that you told him the advice of credit had come in and that you were going to take credit on it rather than you told him it had not yet come in and you wanted permission to do it, take credit on it when it did come in?

A. I did not ask him for permission because the instructions were given to me— [497]

Mr. Lasky: I move to strike out "because." I merely asked him which was the fact.

The Court: It may be stricken. Answer the questions direction.

Q. (By Mr. Lasky): You remember Mr. Duncan told you to call your branch supervisor, Mr. R. D. Libbey about that?

A. He did not put it in that way, if I recall.

Q. How did he put it?

(Testimony of Ivan N. Tarr.)

Mr. Erskine: Wait a second. Let him finish his answer.

Mr. Lasky: Certainly.

A. He said it should go through the regular channels.

Q. To go through the regular channels, and you construed that to mean you were to get in touch with the assistant branch supervisor, Mr. Libbey?

A. Yes.

Q. The head office of the Bank of America has a system of supervisors over the branches, do they?

A. Yes.

Q. A supervisor has jurisdiction of a certain number of branches; is that the system?

A. That is right.

Q. And your East Bakersfield branch fell under the jurisdiction of assistant supervisor Mr. Libbey?

A. That is right.

Q. So then you did telephone your branch supervisor, did you? [498] A. Yes.

Q. You thought he was at Fresno?

A. That is right.

Q. And you telephoned him at Fresno?

A. That is right.

Q. And you could not find him at Fresno?

A. The telephone operator said that he was not at Fresno, that she would try to reach him, that he was in San Francisco.

Q. So then you put the phone call through to San Francisco? A. The operator did.

Q. And you talked to him there? A. Yes.

(Testimony of Ivan N. Tarr.)

Q. And you told Mr. Libbey that the wire from Continental had come in the night before and you asked Mr. Libbey please could your branch take credit on the \$113,000? A. No.

Q. You did not? What happened?

A. I advised Mr. Libbey along the same lines I discussed with Mr. Duncan.

Q. What was that?

A. That we were going to take credit on the \$113,000 and also that we were advised that the \$97,000 worth of items were being returned.

Q. Do I understand you to say that you put in a telephone call to Fresno and then on through to San Francisco, and you [499] tracked Mr. Libbey all the way down to San Francisco just to tell him that you were going to take the credit rather than to ask his permission?

A. That is right. He should be advised.

Q. Is it your customary practice to get in touch with your supervisors to tell them what you are going to do?

A. Anything that might require—something unusual may be in the operations that might require a notification as to the branch supervisor, assistant branch supervisor.

Q. Now, Mr. Tarr, isn't it a fact that on the 18th day of November you had been in telephone conversation or communication with your San Francisco headquarters office?

A. The date, please?

Q. November 18th, the day before the telephone

(Testimony of Ivan N. Tarr.)

conversation with Mr. Libbey; I will re-word the question. It is a fact, is it not, that on November 18th, you had a telephone conversation with Mr. Duncan of the head office?

A. I do not recall that call.

Q. You do not recall it? A. No.

Q. You do not recall having talked to Duncan on the 18th?

A. There was one call that he called Mr. Estri-bou.

Q. But don't you remember that Mr. Etribou turned the call over to you?

A. Yes, I was up at his desk. Is that the call that you have [500] reference to?

Q. I merely asked you whether you did not have a telephone conversation with Mr. Duncan on the 18th? You did? A. Yes.

Q. You talked about this \$113,000 advice of credit which had not yet come into your branch?

A. No, he did not discuss that with me. If I recall, he had me look up some items on the account.

Q. You remember on November 17th, Mr. Etribou told you about a telephone call he had had from Mr. Messenger? A. Yes.

Q. And you remember on the 18th, Mr. Etribou told you about the telephone calls he had with Mr. Kenneth Johnson and Mr. Duncan at the head office about the \$113,000 advice of credit?

A. He mentioned the calls but I do not know what the conversation was.

Q. Had you finished? A. Yes.

(Testimony of Ivan N. Tarr.)

Q. Mr. Tarr, isn't it a fact that on November 18th you personally took the original deposit slip covering \$113,216.50 and marked it "Uncollected and unpaid" and that after you got Continental's wire late that night, either then or on the next day you destroyed the original tag? A. No.

Q. I want to show you two tags and ask you some questions [501] about them. I show you here a tag that has been marked Plaintiff's Exhibit No. 9, a carbon copy, which has already been in evidence and stipulated to be a carbon of the original deposit tag that came in on the \$113,000 item on the 10th. Will you examine that? A. Yes.

Q. Will you notice, please, that it has no marks of any kind on it?

A. Nothing but the time stamp.

Q. And the date on which it came in?

A. That is right.

Q. I show you here Plaintiff's Exhibit 15, which is a typewritten document, deposit tag, Frank C. Lofendo, for \$113,000, which the evidence shows was prepared on November 19th by your branch?

A. Yes.

Q. You prepared that, didn't you?

A. Yes.

Q. Personally?

A. Well, I do not know about that.

Q. Well, under your supervision?

A. Yes.

Q. How does it happen, Mr. Tarr, that in this particular case of the \$113,000, instead of using the

(Testimony of Ivan N. Tarr.)

deposit tag, a completely new deposit tag was typed up in the branch's office on November [502] 19th and ordered to put through the credit to the Lo-fendo account?

A. We have no use for that original deposit tag in any case when items are sent out for collection. We could not use that tag anyway, even though the collection was paid.

Q. Isn't this other tag, Plaintiff's Exhibit 15, the most unusual sort of thing to use to credit a collection item after it has been collected?

A. No, that is—

Q. You use this all the time?

A. That is right.

Q. And not the collection papers themselves?

A. That is right.

Q. You always prepare one of these, do you?

A. Yes.

Mr. Lasky: That is all.

Cross-Examination

By Mr. Erskine:

Q. I think you said, Mr. Tarr, that the wire respecting the \$97,000 in checks was received from the Merchandise Bank?

A. I could be wrong there. I don't recall,—I mentioned that because that is where the checks were drawn.

Q. Do you recall whether or not it was received from the Continental Illinois Trust Company?

A. It could have been. [503]

(Testimony of Ivan N. Tarr.)

Q. You were also asked whether or not you telephoned to Howell. With respect to that, Mr. Tarr, did you believe at that time, in October, 1948, that Lofendo was connected, had some relationship with any firm down there in Bakersfield?

Mr. Lasky: I object to that as immaterial.

Mr. Erskine: Well, you asked if he telephoned to Howell. He did not telephone to Howell. I am trying to bring out the circumstances.

Mr. Lasky: Withdraw the objection.

The Court: Overruled.

The Witness: That was how I met Lofendo the first time was through Mr. Mazzi of Mazzi Farms.

Q. (By Mr. Erskine): And when you telephoned, as stated in your memorandum—I don't know whether you stated it there or not—at any rate, after this memorandum of October 22nd, you tried to get in touch with Mr. Lofendo?

A. Yes.

Q. Where did you telephone when you tried to get in touch with Mr. Lofendo?

A. I called the Bakersfield Inn, where he always stopped. I called there first and they stated that he was not there at the present time. He was not registered. So I then called Mazzi Farms and asked for Mr. Mazzi, and Mr. Howell answered the phone and stated that Mr. Mazzi was out. So I asked Mr. Howell about that at the time. [504]

Q. If he knew where Lofendo could be reached?

A. Yes.

Q. And what did he tell you?

(Testimony of Ivan N. Tarr.)

A. He stated that he was not in town at the present time, that he was in Chicago, and he was expected back in about two weeks, and occasionally Mr. Lofendo would call out to Mazzi Farms, and he said that if he should call within the next couple of days he would pass the information on. And I asked him if he would pass the information on to Mr. Lofendo, to have Lofendo contact Etribou as soon as possible. [505]

Q. And shortly after your memorandum of October the 22nd, Mr. Lofendo and another man turned up in the branch, is that right?

A. Yes.

Q. Now, Mr. Tarr, counsel has asked you about that portion of your memorandum of October the 22nd, the first paragraph of it, which says, "It has been brought to my attention of unusual operations between the two subject parties." That is, United Produce and Lofendo. Now did you have any conversation prior to the preparation of that memorandum of October the 22nd with respect to this Lofendo account, with Mr. Etribou?

A. I believe that was discussed at an officers' meeting.

Q. On what day, do you recall?

A. On the 20th.

Q. And was there any suggestion made at that time with respect to wiring the Merchandise National Bank concerning the account?

A. It was suggested, or rather I received an instruction from Mr. Etribou, to wire the bank

(Testimony of Ivan N. Tarr.)

asking them for the credit responsibility of the United Produce Company.

Q. And did you send out such a wire?

A. Yes.

Mr. Erskine: You haven't got the original of that wire, Mr. Lasky?

Mr. Lasky: Remember, you couldn't find the copy in your file and we couldn't find the original—although we both [506] knew there was some such wire.

Mr. Erskine: Yes.

Q. Now, did you get a response to your wire, Mr. Tarr? A. Yes.

Q. I show you an exhibit that has been introduced in evidence in this case, marked Defendant's Exhibit O, and I will ask you if that is the wire that you got in response to your wire (handing to witness)? A. Yes.

Q. Now this wire says, among other things:

"Suggest you contact your main branch at Fresno, California, who have complete information."

That is the last words in the wire, and it is signed by Reichwine, vice-president. Did you contact the Fresno office of the Bank of America for additional information with respect to the United Produce Company? A. Yes.

Q. With whom did you talk there, Mr. Tarr?

A. Talked to Mr. Nelson, the Fresno main office.

Q. Tell me, what did you say to Mr. Nelson?

A. I believe I read the wire that I had received

(Testimony of Ivan N. Tarr.)

and I told him that I was trying to secure further information in regard to the credit responsibility of United Produce Company and asked him what he could give me on it, and in his wire it referred us to the Fresno main office. And he—— [507]

Mr. Lasky: Just a moment. The question was what was said to Mr. Nelson.

Q. (By Mr. Erskine): Yes, then what happened after you said that to Mr. Nelson, Mr. Tarr?

Mr. Lasky: Just a moment, please. I would like to put in an objection. Number 1, we are not bound by what Mr. Nelson said, and Number 2, it is not cross-examination. I asked this witness nothing at all about that subject matter—didn't refer to it.

Mr. Erskine: Well, we will come back to the same old thing.

The Court: I don't know that it is technically proper cross-examination, but if it is going to speed anything up, I am in favor of listening to it at this point. The other objection, however, has merit. What is your position there?

Mr. Erskine: I think it is part of the circumstances, part of the res gestae. It is our contention, your Honor, that the Merchandise National Bank by this wire to us of October 20th, to the Bakersfield branch, said, "Suggest you contact your main branch at Fresno, California, who have complete information."

The witness has stated that he has contacted the Fresno branch. And I now propose to show that the Fresno branch had a letter from the Merchandise

(Testimony of Ivan N. Tarr.)

National Bank dated September the 22nd, 1948, and that the officer in the Fresno branch with whom the witness had this telephone conversation [508] read to him the letter, or a substantial part of the letter, and that that was the means by which the Merchandise National Bank chose to communicate additional information with respect to the United Produce Company to the Bakersfield branch.

Mr. Lasky: Well, of course, if a letter was written to Fresno and the wire refers to it, it brings the letter into it. But it doesn't bring into it anything that Mr. Nelson at the Fresno branch may have chosen to say about the letter, or any characterization—

The Court: His interpretation of the letter.

Mr. Lasky: Or the interpretation of the letter. The letter is one thing, Nelson's statements are quite another.

The Court: Are you going to produce the letter, is that it?

Mr. Erskine: I want to introduce the letter. I will introduce it right now, if your Honor pleases.

Mr. Lasky: If the letter ever came to the Bakersfield branch—that would be a necessary predicate.

Mr. Erskine: Oh, no; I think if the letter was communicated to the Bakersfield branch, that is all that I have to show.

The Court: Well, yes; I think that if the letter that Merchandise sent was communicated to the Bakersfield branch, that is sufficient.

(Testimony of Ivan N. Tarr.)

Mr. Lasky: If the letter was communicated, yes; but not Mr. Nelson's statement. [509]

The Court: No, not Mr. Nelson's statements interpreting the letter, what it means or anything of that nature.

Mr. Erskine: But if Mr. Nelson read that letter to the witness, that is a communication of it.

The Court: That is a communication, surely.

The Clerk: This is for identification right now.

The Court: It will have to speak for itself.

The Clerk: Defendant's Q for identification.

(Whereupon letter dated September 22, 1948, from Merchandise National Bank to Bank of America, referred to above, was marked Defendant's Exhibit Q for identification only.)

Mr. Erskine: That is letter of September 22, 1948. (To reporter): What was the last answer given by the witness?

(Record read.)

Q. (By Mr. Erskine): What did Mr. Nelson do when you told him about the wire?

A. He said he would go to the file and see what he had.

Q. And then was there a pause in the conversation? A. Yes, I waited some time.

Q. Then what happened?

A. He came back to the phone and he brought a letter back.

Q. And what did he do with respect to that letter?

(Testimony of Ivan N. Tarr.)

A. Well, he read the letter over the phone.

Q. Now I will show you this letter that is marked Defendant's Exhibit Q for identification and ask you if you will read that [510] letter and tell me if that is the letter that Mr. Nelson read to you over the telephone? (Handing to the witness.)

A. Yes, I can remember parts of it.

Mr. Erskine: I would like to offer the letter in evidence.

Mr. Lasky: The witness says it was read to him?

The Court: Yes.

Mr. Lasky: Yes, no objection.

The Court: Very well, it may be so admitted.

The Clerk: Defendant's Exhibit Q in evidence.

(Whereupon Defendant's Exhibit Q for identification only was received in evidence.)

Mr. Erskine: I would like to read the letter, if the Court please. It is a short one.

(Whereupon Defendant's Exhibit Q was read by Mr. Erskine.)

Mr. Lasky: You didn't read the whole thing.

Mr. Erskine: You mean this stamp here?

Mr. Lasky: Yes, it is part of the letter.

Mr. Erskine: "Confidential, for your private use." This is stamped at the top of the letter opposite the—"Confidential. For your private use and without responsibility on the part of the bank or its officers."

(Testimony of Ivan N. Tarr.)

Q. Now, I will show you your memorandum, which says this:

"Mr. Nelson of Fresno main office has been contacted and the information he gave us was no more than was contained in our wire response." [511]

What did you mean by that, Mr. Tarr?

A. Well, I mean that—

Mr. Lasky: Well, I don't think we are bound by what was meant by it.

Mr. Erskine: Well, I would like to have him explain that statement in the memorandum that has been introduced.

The Court: Well, documents speak for themselves, don't they?

Mr. Erskine: Well, in my opinion they do.

The Court: It won't add anything to it.

Q. (By Mr. Erskine): Now after you had received that wire, you had talked with Nelson, did you have another talk with Etribou?

A. Yes.

Q. Tell us what was said in that conversation, Mr. Tarr.

A. I believe I brought him up to date on the wire received and the telephone call, the contents of the phone call.

Q. And what did Mr. Etribou say, what instructions, if any, did Mr. Etribou give you at that time?

A. He asked if—well, he asked that we place a

(Testimony of Ivan N. Tarr.)

hold on the account, or I will put it this way—that we do not extend immediate credit on the deposits until Mr. Lofendo had been contacted.

Q. Until you had contacted Lofendo?

A. Yes. [512]

Q. And it was at that time that you put in your call to the, first at the Bakersfield Inn, and then Mazzi Farm, in an effort to find Lofendo, is that right? A. Yes.

Q. And did you thereafter see Lofendo in the branch?

A. Shortly thereafter he came in the branch with another fellow whom I didn't know.

Q. Did you talk with Lofendo at that time?

A. Yes.

Q. And what was your conversation with him at that time, Mr. Tarr?

A. I was busy at the time, and I asked him if he could step up to the front office, because it was Mr. Etribou that wanted to talk to him.

Q. And did he step up to the front office, do you know? A. Yes.

Q. Who talked to him up there?

A. Mr. Cosgrove.

Q. Mr. Cosgrove is the assistant manager of the branch? A. Yes.

Q. And did Cosgrove tell you what the conversation between him and Lofendo and this other man was after the conversation had taken place?

A. Yes.

(Testimony of Ivan N. Tarr.)

Q. Did you make a memorandum with respect to what Cosgrove [513] told you?

A. I believe it is contained in one of the memorandums.

Q. In the memorandum of November 15th?

A. I believe so.

Q. And can you tell us in substance what Cosgrove told you respecting what he had told Lofendo and this other man, without reference to that memorandum of November the 15th?

A. Well, he said he discussed the method of operations.

Q. That is, Cosgrove?

A. Cosgrove discussed the method of operations with Lofendo, and he seemed to be satisfied.

Q. Did he tell you he was satisfied?

A. Yes.

Q. What else did he tell you?

A. And I believe he asked Lofendo to build up a free balance in the account, to build the account up to the extent where the items, the deposits would clear before he would draw against the account. And he asked him,—that is, Cosgrove asked Lofendo—to send us a letter to that effect.

Q. That is what Cosgrove told you he had told Lofendo and this other man, is that right?

A. Yes.

Q. Now after that conversation had taken place between you and Cosgrove, what did you do with respect to the Lofendo account?

(Testimony of Ivan N. Tarr.)

A. We did not give him immediate credit on deposits, but [514] placed a hold on the account until such time that we would have a reasonable time to clear.

Q. Until the checks would have a reasonable time to clear? A. Yes.

Q. Then did you have another talk with Cosgrove with respect to—withdraw that.

You had an officers' meeting on November the 10th, didn't you? A. Yes.

Q. Did you have a conversation with Cosgrove prior to the date of that meeting?

A. Yes, a short one.

Q. With respect to this Lofendo account?

A. Yes.

Q. What was said in that conversation, Mr. Tarr?

A. Well, I either asked him or he told me that he had not received the letter from Lofendo as had been promised.

Q. And what else was said, if anything, about the subject? A. I don't recall.

Q. Did you then hold your officers' meeting?

A. Yes.

Q. Was the subject discussed then?

A. It was re-discussed at that time.

Q. What was said about it at that time?

A. Well, I was instructed, if I remember correctly, as to the memorandum, I was instructed to send the items out for collection. [515]

Q. Instead of using this hold method that you

(Testimony of Ivan N. Tarr.)

have described, you were instructed that you shouldn't give any credit until you actually got word, is that right? [515A]

A. That is right.

Q. Previous to that time, that is, after October the 22nd, and previous to the conversation of the officers' meeting on November the 10th, the checks deposited to the account had been sent forward with a so-called cash letter, is that right?

A. That is right.

Mr. Erskine: That is all.

Mr. Lasky: Just a question or two.

Redirect Examination

By Mr. Lasky:

Q. Mr. Tarr, you talked to Mr. Nelson about the 20th of October, I think you said, was that right? A. I didn't say.

Q. Well, when was it?

A. It was around that time.

Q. All right. When you talked to him and he read the letter to you that has been given in evidence, Defendant's Exhibit Q, did he read the whole letter? A. Yes, I believe so.

Q. Did he read that stamp that says, "Confidential, for your private use and without responsibility on the part of this bank or its officers?"

A. No.

Q. He did not. When did you first see the letter yourself? A. Today.

(Testimony of Ivan N. Tarr.)

Q. Oh. The first time you have ever seen it, today? [516] A. That is right.

Q. So all that you knew about it up until a few minutes ago was your recollection of what Mr. Nelson had read over the telephone?

A. That is right.

Q. Well, after he spoke to you over the telephone, you then had your meeting with Mr. Estri-
bou in which Mr. Etribou said thereafter you were not to allow Lofendo to draw immediately upon any funds in the account, when deposited, is that right?

A. That is right. He said that we were not to extend immediate credit.

Q. When you talked to Mr. Nelson on the 20th, didn't Mr. Nelson tell you that they themselves had an account in the name of Jack's Fruit Company or Jack Odo, in which they were getting checks of United Produce Company?

A. No, I don't recall that.

Q. Well, didn't you ask Mr. Nelson how the Fresno Branch had anything to do with United Produce Company?

A. No, I didn't discuss it.

Q. You were wholly incurious about it when you talked to him on the phone?

A. I was satisfied with the letter that he read.

Q. Didn't he tell you that his branch even then was refusing to honor checks of Lofendo against the deposits until they were cleared? [517]

(Testimony of Ivan N. Tarr.)

A. No.

Q. Didn't they tell you that? A. No.

Q. Didn't he tell you that even then, despite this letter they got from Merchandise Bank, they were rejecting checks of Lofendo's drawn against deposits which had not yet cleared?

A. No.

Q. Well, in any event, when you talked, after you talked to Mr. Nelson, you considered the situation with respect to United Produce Company's checks to be such that you weren't going to pay out against them until there was a period of time in which they could clear it, is that right?

A. Considered there was a good report.

Q. I didn't ask you that. I asked you whether you considered the situation was such that you decided you were not going to pay out against the Lofendo account on checks from United Produce Company until they had cleared? A. No.

Mr. Lasky (To reporter): Will you reread the question, please?

(Record read.)

Q. (By Mr. Lasky): You say you didn't consider the situation to be such? Do you understand me? A. I don't quite get your question.

Q. Well, Mr. Tarr, after your telephone conversation with [518] Mr. Nelson and after the wire you got from Merchandise Bank, you then had your discussion with Mr. Etribou, and the two of you concluded that, anyway, you were going to put in instructions that no checks were to be

(Testimony of Ivan N. Tarr.)

honored on the Lofendo account against deposits that had not yet cleared, is that right?

A. That is right.

Q. Very good. And ten days later, after Lofendo and Rosenthal came in, and a little later after that, when you failed to get a letter from Rosenthal, you decided that all their explanations were no good, and you went upon the more strict basis with respect to the Lofendo account, is that right?

Mr. Erskine: Well, I don't know about the form of the question. He asks for decisions on things of that sort. He can ask what was done.

The Court: Yes, I think that is so. It was after that time when the method of handling the items was by collection.

Mr. Lasky: Yes.

The Court: Collection only. That is the whole story of the thing.

Mr. Lasky: All right, I will withdraw the question. I think the facts are before the Court and the conclusions are there to be drawn freely.

The Court: Surely.

Mr. Lasky: No further questions, Mr. Tarr.

Mr. Erskine: Just one question, Mr. Tarr. [519]

Recross-Examination

By Mr. Erskine:

Q. You said that you had seen the letter of September 22nd for the first time—I don't know whether you said a short while ago or what you

(Testimony of Ivan N. Tarr.)

did say. It is a fact is it not, that I showed you that letter in the office today, my office?

A. Yes, I said I saw it today.

Q. Yes.

Mr. Lasky: By the way, in view of the witness' testimony that the whole letter was not read, the stamp wasn't read, and that he didn't read the letter until today, I move to strike the letter from evidence, because we can't be bound by any partial contents of it that may be forwarded in any way to the East Bakersfield Branch.

The Court: Well, at least that portion of the letter that was read to him is admissible in evidence.

Mr. Lasky: Oh, I think the whole thing—this letter must to taken as a whole. When our bank sent it out, it sent it out with the protection of the stamp, that they assumed no responsibility for its contents. Now if that is forwarded to the Bakersfield Branch from the Fresno Branch without that, and there seems to be some claim that the East Bakersfield Branch in some way relied on this, although the evidence won't support it, I don't see how that can be attributed to us, because they are not acting upon precisely the document, and everything we [520] said, but only one partial bit of it they fixed up. [520A]

Mr. Lasky: Very well, your Honor.

The Court: But surely, if they didn't advise them of the stamp that appears on the letter, why

then, that goes as to how much reliance they were entitled to place or now claim, and bind you. That is just a matter for the Court to consider.

Mr. Lasky: Very well. I have no further questions of the witness.

Mr. Erskine: No further questions.

The Court: Very well. Does that end all of your matters?

Mr. Lasky: I have a short stipulation concerning Dean Howell's testimony which I might read. It is only a page and a half. May I read it?

The Court: Yes. You may step down.

(Witness excused.)

Mr. Erskine: Mr. Tarr is excused?

Mr. Lasky: Mr. Tarr is excused and we will not need him again, at least, I will not.

The Court: Very well.

Mr. Lasky: This is a stipulation that what I am about to read may be taken as the testimony of Dean Howell.

TESTIMONY OF DEAN HOWELL

"I reside in Bakersfield, California, and have done so for several years.

"I am Office Manager of Mazzie Farms at Arvin, California, near Bakersfield, and I held that [521] position in 1948.

"In 1948 I met one Frank C. Lofendo in connection with work and business done by Mazzie Farms.

"From April, 1948, to September, 1948, when Lo-

(Testimony of Dean Howell.)

fendo was in Bakersfield I posted mail for him as a favor.

"About September 15, 1948, I received through the mail from Lofendo a letter dated September 13, 1948, enclosing two sealed envelopes. These enclosed sealed envelopes bore the imprint of Bakersfield Inn, Bakersfield, California, as the return address. Each of the enclosed envelopes was addressed to Bank of America, East Bakersfield Branch, Bakersfield, California.

"The letter itself requested me to mail one envelope on September 15, 1948, and one on September 16, 1948. I mailed these envelopes on these dates as requested.

"Thereafter, from time to time until about the middle of November, 1948, I received through the mail envelopes addressed to me which bore the imprint of United Produce Co., Chicago, Illinois, as the return address with the initials "F. L." typed above the printed name of United Produce Co. Each of these envelopes contained one or more sealed envelopes bearing the imprint of Bakersfield Inn, Bakersfield, California, as the return address and addressed to Bank of America, East Bakersfield Branch, Bakersfield, [522] California.

"Some of the outer envelopes addressed to me also contained a slip of paper with the notation when the inner envelope was to be mailed.

"I mailed all the enclosed envelopes.

"I did not open them.

(Testimony of Dean Howell.)

"One day in October, 1948, Mr. Tarr of the Bank of America, East Bakersfield Branch, telephoned me and told me that Mr. Etribou wanted to talk to Mr. Lofendo about Mr. Lofendo's account and asked me where Lofendo was.

"Either the same day or the next day Lofendo telephoned to me stating he was in Chicago.

"I told Lofendo in that telephone conversation that Mr. Tarr had telephoned me, and I told Lofendo what Mr. Tarr had said. Mr. Lofendo stated that he was flying to Bakersfield from Chicago.

"On or about October 23, 1948, Lofendo called on me, together with a man whom he introduced as Mr. Rosenthal, an officer of United Produce Co.

"Later on that day or the next day I again saw Lofendo, and he told me that he and Rosenthal had just talked to an officer of the Bank of America, East Bakersfield Branch.

"Some time about the middle of November, 1948, I received a telegram from Rosenthal stating 'Do not mail any more envelopes.' This telegram was telephoned to me [523] by the telegraph company, and I do not have a written copy.

"I do not recall the date of receipt of this telegram, but I can fix it in relation to another event. Within a day or so thereafter Mr. Etribou of the East Bakersfield Branch of the Bank of America telephoned to me and said, 'You had better come down here at once and explain your connection with Lofendo.'

(Testimony of Dean Howell.)

"I did call at the East Bakersfield Branch of the Bank of America and talked to Mr. Etribou, telling him that I had mailed envelopes addressed to the East Bakersfield Branch of the bank as a favor for Lofendo. Mr. Etribou then told me that the envelopes contained checks payable to Lofendo and deposit slips for deposit to Lofendo's account."

Mr. Lasky: That has been read into the record. I don't suppose it need be marked as an exhibit, but being a stipulation, we can file it in the cause.

The Court: Very well. [524]

Mr. Lasky: Now, if the Court please, the only other thing that I have besides the proposed stipulation hanging fire on the Chicago book and the reduction to narrative form of Gassman of Lofendo's testimony, is the question of whether Mr. Tobey and Mr. Erskine would produce a so-called privileged document for my inspection, and if not, I would like to put Mr. Tobey on the stand for a few questions to ascertain whether it can be called a privileged or not.

Mr. Erskine: As a matter of fact, your Honor, I am almost inclined to give him the thing but I have not had an opportunity to read it yet.

Mr. Lasky: Probably when I get it I will find nothing important.

Mr. Erskine: I do not think you will find anything in it you do not already know. I still think it is privileged but I would like to look at it. I will do it this evening.

The Court: Be prepared with reference to the matter in the morning.

Mr. Erskine: Yes. I do not stipulate I will let you see it. I think it is hearsay and I think it is privileged.

The Court: Be prepared one way or the other.

Mr. Lasky: Outside of those things that are still hanging fire, the Plaintiff's opening case in chief rests.

Mr. Erskine: It looks as though we are making good progress your Honor, and I do not think we will have to take much of your [525] time next week. I just want to examine Mr. LeRoy and Mr. Messenger, and then I will introduce part of the depositions, and then I will produce Mr. Tobey, and I will have perhaps two additional witnesses, but I think we ought to get through by Friday evening. I hope so. Subject, of course, to the fact that Mr. Lasky and I will wrangle about the stipulations during the week and take it up with you if we can't possibly agree.

Mr. Lasky: I hope your evidence does not require me to put in any rebuttal.

The Court: And you hope that Mr. Lasky does not waste a lot of time cross-examining your witnesses, is that it?

Mr. Erskine: I hope there is nothing insidious in that remark.

The Court: Very well, I think possibly if we do not meet until ten o'clock, we can get along well enough.

Mr. Erskine: I think so.

The Court: If necessary we have Monday of next week at our disposal, and we have Saturday of this week. So Court will stand in recess until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10 o'clock a.m. tomorrow morning, Thursday, June 22, 1950.) [526]

Thursday, June 22, 1950 at 10:00 A.M.

The Clerk: Merchandise National Bank vs. Bank of America on trial.

Mr. Lasky: I observed last night on reviewing the papers that the Defendant's retained office copy of the collection letter on the \$113,000 item has not been put in evidence, and with the consent of Mr. Erskine—he has consented—we have agreed that is ought to go in evidence. If Mr. Tobey will hand me that, I will put it in as Plaintiff's Exhibit 22.

(A document was handed to Mr. Lasky.)

Mr. Lasky: This is it. The document counsel hands me has two different ones.

Mr. Tobey: That is the way they come.

Mr. Lasky: The only one we are interested in is one that pertains to the \$113,000.

The Court: Very well, it is admitted.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 22.)

Mr. Lasky: I wonder if counsel has yet had an opportunity to clear the stipulations in which I

am interested on the depositions and the other, have you, Mr. Erskine?

Mr. Erskine: I have prepared a draft of a stipulation, your Honor, on that long stipulation that we discussed in the office. I will give you a copy of that, but I have not cleared [527] the others yet, but I assure Mr. Lasky I will have it cleared by tomorrow morning and I know there will be no doubt about it.

Mr. Lasky: With the reservation of my rights, my case is closed.

The Court: Yes. Very well.

Mr. Erskine: Before we start in, do you want to talk about this Tobey report? We can get that out of the way. I read that last night. My position about that, your Honor, is this: It might take a little time, but I would like to make this clear. I warn counsel and I say to the Court I am going to let him see the report. I do not care. But there is nothing in the report that is not in evidence. But I want to vindicate briefly as I can the position that I took with respect to the matter and I still think the position is sound. Mr. Tobey will testify, as I understand it, that after he got back to San Francisco from Bakersfield he saw Schilling. Schilling is counsel for the Bank, assistant counsel, I think, and also an officer of the bank, but in the legal department of the bank. Schilling told him to prepare a report dealing with what he had found out when he was down in Bakersfield because litigation threatened and he prepared a report, to Mr. Schilling with respect to what had taken place, that is

a very detailed report. It has attached to it the opinion of Mr. Bianco, who is counsel for the Bank, addressed to Mr. Schilling giving Bianco's idea of what he discovered, the law upon which he was relying, and etc., and so on. [528] Now, when Mr. Lasky asked for the production of it I said this:

"Now, with respect to that, that is the report which the witness states was made by him to Mr. Schilling and his counsel with respect to this matter. I regard it as privileged, and therefore as something he is not obliged to produce. We would be willing to produce it provided we are assured by you, Mr. Lasky, that the similar reports made by officers of Merchandise to its counsel, both yourself and Mr. Riordan in Chicago, will be produced for our examination. Now, I suggest we would be interested in seeing, of course, not only the report, if any, made by Mr. LeRoy to you personally, for similar reports made by officers of Merchandise, including Mr. LeRoy, to Mr. Riordan," whom I understand to be the counsel for the bank in Chicago—"who I understand is the counsel Merchandise in Chicago or any other counsel of the Chicago there or here in Chicago. Now, I do not know what your attitude would be with respect to that matter, but I would suggest this, that we do not want to place ourselves in a position in which Mr. Riordan refused to be bound by any agreement made by you. I do not suggest that he would refuse, but we want to be assured that if you made an agreement with me that such reports would be disclosed to us,

you make such agreement after consulting with Mr. Riordan so we can be sure that agreement will be carried out and have Mr. Riordan's full approval.

"In addition to that we would like to have it part of the [529] understanding that we will be given an opportunity to examine such reports at the same time that we disclose Mr. Tobey's report to Mr. Schilling to you. Now, that is our attitude with respect to this matter, and I think I have made it clear. You might state your position with respect to it, if you care to do so at this time."

Mr. Lasky said Mr. LeRoy had made oral report to him and he did not have a written report from Mr. LeRoy, that he did not know what Mr. Riordan's position would be.

Now, the law on the subject is stated in the case of Hickman vs. Taylor, a well-known case. I have no doubt the Court is familiar with the case, the case of this business of discovering in the Federal Court, giving very wide scope to the discovery but recognizing that the privilege of attorney and the client should not be undermined.

"We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation or necessarily free from discovery in all cases." This is after they said there should be a privilege. Let me go back a little bit.

"Were such materials open"—That is, materials obtained or prepared by counsel during a case or preparing for possible litigation—"Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would

remain unwritten. An attorney's heretofore inviolate would not be his [530] own. Inefficiency, unfairness and sharp practice would inevitably develop in the hearing of the legal advice and preparations of cases for trial. The effect on the legal possession would demoralized, and the cause of the client and the cause of justice would be poorly served. We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant, non-privileged banks remain hidden in an attorney's file, and where production of those facts is essential to the preparation one's case, discovery may properly be had," and so on.

It is true that Schilling is an officer of the bank as well as being the counsel of the bank, but his job is legal advice, legal help, and I think the fact that he is the internal counsel for the bank does not affect the matter of privilege. Otherwise corporations could not hire internal counsel. They would have to consult lawyers with outside counsel, and that does not make any difference. It is true that Mr. Tobey stated on the taking of his deposition prior to testifying he had read over the report, but if it is privileged that certainly does not destroy the privilege. If a lawyer has a written report from his client, and they are preparing to give a deposition or to go to trial, they certainly discuss the case with reference to the report, but that report cannot destroy the privilege, and I have not

been able to find any case holding that those [531] circumstances do destroy the privilege.

Now, it is also true that the later on Mr. Lasky asked Mr. Tobey questions about what he had done in Chicago, and Mr. Tobey was sent back to Chicago by Mr. Schilling to make an investigation and to report to Mr. Schilling, Mr. Tobey prepared another letter to Mr. Schilling stating what he had learned back in Chicago. Mr. Lasky's questions were not directed to the written report made by Tobey to Schilling of what he had done in Chicago, but to what the conversations between Tobey and the people he saw in Chicago were as reported back to Schilling, and I objected to that testimony. Now, we are willing to give them the report, your Honor, because there is nothing in that report that is not completely before this Court. It involves that letter of Bianco and other stuff, but it does not hurt us any. I will be frank to say that. Otherwise I would put up a fight on the proposition. We do not want to go into the Chicago business. We saw a lot of people back in Chicago and we had confidential discussions with them, and it might hurt them if it was disclosed.

Mr. Lasky: I am not interested in the Chicago phases of it.

Mr. Erskine: I will let him see the report.

Mr. Lasky: Before we come to that, however, let me say this: [532] On the taking of the depositions back in Chicago, Mr. Lasky refused Mr. Messenger and other witnesses—well, let me confine it to Messenger; that is as far as I got in my re-examination

of the depositions in this respect—he refused to permit Messenger to furnish certain reports and data for which I asked when the depositions were going on.

For example, on pages 377 to 378 of the Messenger deposition, I asked Mr. Messenger to furnish the form of financial report used by the bank in securing financial reports from the customers. I wanted it in connection with the investigation that they had made of United Produce, and to find out whether they were negligent or not. And Mr. Lasky refused, told Mr. Messenger not to produce it, and it was not produced.

On pages 378—

Mr. Lasky: Pardon me; we might as well clean up each of these as we go along if you think they are of importance. My memory is that we produced every paper we ever obtained from United. You asked for some paper which was not used with respect to United.

Mr. Erskine: It was a form of the bank statement which the bank requires of its customers before it makes them loans, a statement of their financial condition, and I wanted to find out whether such a statement had been procured from the United.

Mr. Lasky: You got the answer that it wasn't, and then you went on and wanted forms which were not used. We were on [533] about the 15th day in Chicago and we were getting tired.

Mr. Erskine: It wasn't the 15th day.

The Court: Gentlemen, if we are going to discuss matters of this nature, I think maybe we can handle them more quickly without cluttering up the record if we go into chambers and, we might settle some of these matters.

The Court will stand in recess.

(Recess.) [534]

Thursday, June 22, 1950, at 2:00 o'Clock

The Clerk: Merchandise National Bank vs. Bank of America National Trust and Savings Association.

Mr. Erskine: May I call Mr. LeRoy?

Mr. Lasky: Before you do that, may I suggest that, having examined the report of Mr. Tobey, there are two or three matters in there that I would like to get into evidence, and perhaps we can get it in by agreement.

Mr. Erskine: What are they? Of course, your Honor, he is entitled to see the report, perhaps, as part of the discovery, but the report is clearly hearsay.

Mr. Lasky: That is right; that is right, but it makes certain statements of fact.

The Court: Which reflects a situation which you may agree upon.

Mr. Lasky: That was it. Obviously, if we couldn't agree upon it, I would have to call Mr. Tobey and ask questions on it.

Mr. Erskine: What points have you in mind? I think we might possibly agree on it.

Mr. Lasky: There aren't many. Number one is

that Mr. Tobey himself on the morning of Saturday, November 20th, told Mr. LeRoy at Bakersfield that the Bank of America would have to charge Merchandise's account for the \$113,000. It was the future tense that I am referring to.

Mr. Erskine: Well, I am not going to stipulate to that. [535] You can put Mr. Tobey on the stand. The evidence shows already the charge was made on the morning of the 19th.

Mr. Lasky: The next thing is that on Saturday, the 20th, Etribou, Mr. Libby, the assistant vice supervisor, and Mr. Tobey, while at the East Bakersfield branch telephoned to Mr. Schilling, and it was in that telephone conversation of the morning of Saturday, November the 20th, that it was decided that the Bank of America would credit the \$113,000 to the credit of the Lofendo account.

Mr. Erskine: I am not going to agree to that. You can examine Tobey.

Mr. Lasky: The next is with respect to these items of \$75,000 which we talked about as laying around the branch and which we finally said were physically in the branch from Saturday, the 13th, until the following 18th. The situation was this: That these checks on Saturday, November 13th, were rejected by the bookkeepers at the branch because of insufficient funds in the Lofendo account, but through oversight the three checks were not returned but were held over until Monday, the 15th; that at that time when the checks for \$97,000 came into the Lofendo account and immediate credit was given against them, it was the intention to

charge the \$75,000 checks against that credit, but through oversight it was not done, and that, instead, further checks for a hundred odd thousand dollars came in and were charged against that credit, so that the \$75,000 checks [536] were not charged off until after credit for the \$89,000 collection letter had come through.

Mr. Erskine: I agree to that but I would like to put it in my own words, and consider the words in which it is put. We can put it in that stipulation that we were discussing the other day.

Mr. Lasky: You wish to draw up some language. I think we can wait.

Mr. Erskine: Mr. Tobey doesn't agree with that. However, I am perfectly willing to put into the stipulation that we were discussing the other day when this same subject what is in the report. That is the fact.

The Court: With reference to that last matter?

Mr. Erskine: Yes. I don't know as counsel's language is quite correct.

Mr. Lasky: I was summarizing it pretty hastily, obviously.

The Court: Very well then, you can work on that as part of the stipulation.

Mr. Erskine: Part of the other stipulation.

The Court: Very well.

Mr. Erskine: I think I should be permitted to go ahead with my case.

Mr. Lasky: This was one of the points kept open on my case.

The Court: Yes, I think so. I think counsel

should be permitted to examine with reference to the matters that he now [537] mentions.

Mr. Lasky: Then I ask Mr. Tobey to take the stand.

LLOYD J. TOBEY

recalled as a witness on behalf of the Plaintiff, previously sworn.

Direct Examination

By Mr. Lasky:

Q. Mr. Tobey, on the morning of Saturday, November the 20th, you had breakfast with Mr. LeRoy in East Bakersfield, did you not?

A. That is correct.

Q. And at that time you told him you were going to the East Bakersfield branch to get details about the Lofendo situation?

A. That is correct.

Q. And you told him that the Bank of America would have to charge Merchandise's account for the \$113,216.50?

A. My answer would be "yes," but I would like to explain it, your Honor.

The Court: All right.

Mr. Lasky: You are entitled to explain it.

The Witness: That's when I talked with Mr. LeRoy, I was in no position to give him and discuss any details, because I was charged with making an investigation, but I wanted to him to have an idea that his account was being charged, and our attorney told him very emphatically on Sunday just before he left that his account had been charged.

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: I move to strike what the attorney told him on Sunday, that is after this conversation, and no explanation. [538]

The Court: It may be stricken.

Mr. Lasky: You didn't tell Mr. LeRoy at that time, that particular day, you had already put through a debit entry?

A. I did not.

Q. Now, sir, on November 20th, Saturday, you were at the branch with Mr. Libby and with Mr. Etribou, is that correct? A. Yes, sir.

Q. And you gentlemen had a telephone conversation that morning with Mr. Schilling?

A. That is correct.

Q. Mr. Schilling was in San Francisco?

A. Yes, sir.

Q. And in that telephone conversation it was agreed that the East Bakersfield branch should post or charge—credit, rather, the \$113,216.50 to the credit of the Lofendo account?

A. It is my recollection that my report says at that time we discussed the posting of the entry. The entry had been made, and we only discussed the posting of the entry.

The Court: It isn't a question of what your report shows; it is a question of what happened.

A. He asked me if we had a discussion, and he used three words "posting" and "charging" and "crediting," and my report says we discussed posting.

(Testimony of Lloyd J. Tobey.)

Mr. Erskine: Just tell Mr. Lasky what the conversation between you and Schilling was. [539]

The Court: At this point it isn't what your report shows that we are inquiring about. He is inquiring about what you did, not in your report, but what you said in your conversation.

Mr. Lasky: Yes. And my question was whether it is not a fact that in that conversation you agreed, it was agreed among you gentlemen, that you would post \$113,216.50 to the credit of Frank C. Lofendo.

Mr. Erskine: I think the question is improper; he is asking for the conversation, not what was agreed.

The Court: A conclusion as to the agreement. That is another one of those things that it is hard to separate the ultimate fact from the all of the facts that go to make it up.

Mr. Lasky: This is an adverse witness.

The Court: We all understand when the words "we agree" are used, we are not talking about a contract.

Mr. Lasky: What was said.

The Court: Those are words that we all understand the meaning of. But go ahead and develop the situation.

Mr. Lasky: Will you answer the question please?

A. Would you mind having it read?

Mr. Lasky: Certainly; would you read the last question?

The Witness: So that I know just what I am answering.

(Testimony of Lloyd J. Tobey.)

(The reporter read the last question.) [540]

Mr. Erskine: Same objection, your Honor.

The Court: Overruled.

A. It was agreed that we would post the entries to the account of Frank C. Lofendo.

Mr. Lasky: That is all.

Mr. Erskine: Let me see that report, please. Will you let me see Plaintiff's Exhibit No. 1?

Recross-Examination

By Mr. Erskine:

Q. Now, Mr. Tobey, I will call your attention to Plaintiff's Exhibit 2 in this case, which reads as follows: "General Ledger debit, accounting department, November 19th, 1948, \$113,216.50, total of collection letter of East Bakersfield Branch, No. 419, to Merchandise National Bank, Chicago, for which they have credit advice and are sending their debit. This debit requested by Mr. Etribou per telephone call to Mr. George Schilling, legal department."

Now, you prepared that debit memorandum, did you not? A. Yes, sir.

Q. That was prepared on the date it bears, November 19th? A. Yes, sir.

Q. Prior to your going down to Bakersfield?

A. Yes, sir.

Q. Mr. Schilling at that time told you that he talked with Mr. Etribou, and that Mr. Etribou

(Testimony of Lloyd J. Tobey.)

was going to enter the credit and wanted the debit entry to be made up in the central [541] office in order to charge the books of the Merchandise Bank?

A. That is correct.

Q. That is what you were told at that time?

A. That is correct.

Q. And therefore you made the debit entry, is that right? A. That is correct.

Q. And this Plaintiff's Exhibit 2 reflects what you were told? A. That is correct.

Q. And what you did?

A. That is correct.

Q. When you got down to Bakersfield and made the investigation, did you find out when this Defendant's Exhibit A, that is, the advice of credit relating to the six checks, was received at the bank?

A. I did.

Q. Did you find out that it was received as stamped or at 8:15 on the morning of November 19th at the Bakersfield Branch? A. Yes, sir.

Q. And did you find out at that time when the actual entry of that credit to the account of Lofendo was made by the Branch? A. Yes, sir.

Q. What did you find with respect to that?

A. That they had made a debit on the 19th, on Friday.

Q. Made credit? [542]

A. They made the debit and the credit.

Q. That is, they had sent the debit—by debit, you mean the debit which they had sent to the central office of the bank, so that the "Due To" ac-

(Testimony of Lloyd J. Tobey.)

count of the Bank of America to the Merchandise Bank could be debited with the entry, is that right? They made that debit entry?

A. They made the debit and they made the credit.

Q. That debit had already left the branch for San Francisco? A. Yes, I assumed it had.

Q. You do not know?

Mr. Lasky: I move to strike that out.

The Court: It may be stricken. The answer may be stricken.

Q. (By Mr. Erskine): But you do know that the credit entry was made by the branch on the morning of the 19th?

Mr. Lasky: I object to that as calling for hearsay on his part.

Mr. Erskine: Well, you were asking him about a lot of hearsay and his knowledge.

The Court: He has asked if he knows. He can testify about whether he knows or not. If then later it appears, of course, that it is hearsay, it may be stricken.

Mr. Lasky: From the nature of things, if the Court please, it would be hearsay, would it not? He was not there on the 19th. He did not get there until the 20th.

Q. (By Mr. Erskine): When you got there on the 20th you made an [543] investigation of the books of the branch, didn't you? A. Yes, sir.

Q. Did that credit entry for the six checks, \$113,000, then appear on the records of the branch?

(Testimony of Lloyd J. Tobey.)

A. No, because they had delayed posting and they had not posted the books yet. They posted the books in the morning, as we have talked about, as of the preceding day.

Q. They made the posting on the 20th as of the 19th? A. Yes, sir, that is the practice.

Q. Are you positive that that is so?

A. I am positive that they follow that custom, yes, sir.

Q. Are you sure that they did in this instance?

A. Yes, sir.

Q. Did you inquire into that? On what ground are you basing statement?

Mr. Lasky: Counsel is arguing with the witness.

The Court: He can cross-examine the witness.

The Witness: I did not go beyond this, that the item was in the work and we discussed it and were discussing the posting of it to the account, which would go through the same as all the other work of the 19th.

Q. (By Mr. Erskine): Are you talking from your knowledge of the General Banking practice of post-dating or are you talking from what you actually saw at the branch?

A. I was talking from what I saw at the branch, that they were [544] posting their work on the 20th, which is done in all of our branches. They were posting all the work of the 19th on the 20th and as of the 20th.

Q. This debit entry, Plaintiff's Exhibit 2, says this—this is dated the 19th—this debit requested by

(Testimony of Lloyd J. Tobey.)

Mr. Etribou per telephone call with Mr. George Schilling, legal department, Mr. Etribou requested that debit on the 19th, did he?

A. That is what I was told by Mr. Schilling.

Q. Do you know whether or not Etribou had actually credited the six checks, the \$113,000, to the account of Lofendo on the 19th or not? You know whether or not that was done on the 19th or 20th?

A. The actual posting of the credit was done on the morning of the 20th, along with other credits, with other entries on that day, of the 19th, to the books.

Q. In other words, it was put into the work on the 19th?

A. Put in the work of the 19th and posted on the 20th.

Q. In accordance with the practice of delayed posting? A. That is correct.

Q. Were you there when it was done?

A. I was in the office when the work was done, but all the post work of the 19th was being posted.

Mr. Erskine: That is all.

The Court: Very well, you may step down. Does that complete your— [545]

Mr. Lasky: The Plaintiff's case is over except for the two depositions—

The Court: The stipulations and the agreed statement of the depositions.

Mr. Lasky: That is correct, yes, your Honor.

Mr. Erskine: I want to clear something up;

(Testimony of Lloyd J. Tobey.)

something the witness has made clear to me. May I recall him for one question?

The Court: Yes.

Q. (By Mr. Erskine): Mr. Etribou stated when he testified that he had entered the credit for the six checks on the morning of the 19th. Now, in relation to that statement will you tell us what the procedure in the bank is with the respect to the entry of a credit?

Mr. Lasky: If the Court please, I do not understand the kind of question that starts off, "With relation to the testimony of another witness."

Mr. Erskine: I will withdraw the question and put it this way:

Q. How is a credit to the books of a customer in the bank of America initiated in a situation where a collection has been made such as in the case of the six checks?

A. We make up a debit to the account of the Bank that paid the money or credited the money, and they made up a credit to the customer, and then that is put through the work and into [546] the work, to be posted the next morning.

Q. In other words, the first step in entering the credit is making a credit memorandum. What do you call it?

A. Credit ticket or deposit ticket.

Q. A credit ticket or deposit ticket, is that right?

A. That is correct.

Q. And that is in the work on one day, is that right? A. That is correct.

(Testimony of Lloyd J. Tobey.)

Q. And according to the process of delayed posting, if it is posted on the succeeding day, is that right? A. That is correct.

Q. Do you know when the deposit ticket or credit ticket in the case of these checks was put in to the work of Bakersfield Branch?

A. I was told that it was put in the work of the 19th.

The Court: Just a minute. The answer may be stricken. It was hearsay.

Mr. Erskine: I will show you here an Exhibit that was marked Plaintiff's Exhibit 15, which purports to be a deposit tag for \$113,216.50, which is dated November 19th, 1948. Is that the deposit tag or credit memorandum that goes into the work to which you just referred? A. Yes, sir.

Q. And that initiates the credit, does it? [547]

A. It does.

Q. It goes into the work, and then in accordance with the process of delayed posting, it is posted the next day? A. That is correct.

Mr. Lasky: If the witness is talking about practice generally that is one thing.

The Court: He was talking about the practice generally.

Mr. Lasky: All right, no objections then.

Mr. Erskine: That is all.

Mr. Lasky: Just one question.

(Testimony of Lloyd J. Tobey.)

Redirect Examination

By Mr. Lasky:

Q. On the morning of November 20th, before the actual posting of the books themselves occurred on this item of \$113,000,, you, Mr. Libby and Mr. Etribou did discuss it with Mr. Schilling by telephone in San Francisco? A. That is correct.

Q. And cleared the subject with them?

Mr. Erskine: Well, I do not know. I do not think you ought to call for these conclusions. I think he ought to ask for what was said.

The Court: Yes, I think that is asking the witness for a conclusion.

Mr. Lasky: I will withdraw the question.

Q. Who was it that conducted the phone conversation or were you all on the telephone at [548] once?

A. We were all on the phone. We talked to Mr. Schilling, I talked, too.

Q. Did you talk to Mr. Schilling yourself about the posting of the \$113,000, to the Lofendo account?

A. I do not know whether I talked to him or Mr. Etribou did, and which one of us talked to him about the account. We reported to him on the examination which had been made up to that time.

Q. You did discuss it with him—

A. We did discuss it.

Q. The posting of it?

A. The posting and clearing of it—the clearing of it and finally the posting of it.

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: That is all.

Further Recross-Examination

By Mr. Erskine:

Q. This is the actual language of your report on the subject?

Mr. Lasky: I object to the use of his language in the report.

The Court: Sustained.

Q. (By Mr. Erskine): Do you remember the conversation that you had with Mr. Schilling, without looking at the report to refresh your recollection with respect to that? A. No, I would not.

Q. What?

A. I wouldn't remember it at this time.

Q. Would you like to examine your report for the purpose of [549] refreshing your recollection with respect to what was actually said?

A. I would because I have not read that report before—

Mr. Lasky: Wait a moment. May I see it first to get the date on it, I am not so sure that this is the kind of report made in the course of business that a man could refer to for the purpose of refreshing his memory. It is dated December 10th.

Mr. Erskine: You were cross-examining him on the face of the report. I would like to get the actual language into the record.

The Court: No cross-examination was conducted on the basis of the report.

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: It gave me a lead and some information.

The Court: He asked some questions but there were no questions as to whether or not he had made such a report.

Mr. Lasky: A report made in anticipation of litigation ought not to be referred to to refresh the recollection of a conversation that occurred that nearly three weeks before.

Mr. Erskine: I want to give a correct picture of what was said. Mr. Lasky has been referring to a report made on December 10th, 1948.

Q. You prepared such a report, did you?

A. I did.

Q. Do you recall the conversation between you and Mr. Schilling with respect to the posting of the six checks, the credit for [550] the six checks on the morning of the Saturday, November 20th?

A. Yes, I recall the conversation.

Q. Tell us what was said in the conversation, between you and Schilling, as well as anything else that was said with respect to the debiting of the \$97,000 against the account. Tell us what was said between you and Schilling on that point, so far as you remember.

A. As I remember it, I was telling him of the entry, of the \$97,000 that we had received in the telegram, and on the \$113,000—

Q. You discussed the entire situation?

A. The whole situation, that I developed up to that time and told him that we had this entry, and

(Testimony of Lloyd J. Tobey.)

they were going to post it and we wanted to post it, and discussed it, questions about it and said, "No," and we went ahead and posted it.

Q. That is, the entry based upon the deposit tag dated November 19th? A. Right.

Q. As well as the \$97,000?

A. In other words, we went ahead to complete the entries which had been made and started and originated on the 19th.

Mr. Lasky: I move to strike his answer, "To complete."

The Court: It may be stricken.

Mr. Erskine: When was the procedure initiated which was completed on the 20th? [551]

Mr. Lasky: That is calling for a conclusion. That would be hearsay on his part.

Mr. Erskine: I think it appears fairly enough anyway. That is all.

Mr. Lasky: I have no further questions.

The Court: Now is the Plaintiff's case closed with the exception of the stipulations that have been discussed and the resume of the depositions?

Mr. Lasky: That is correct, your Honor.

Mr. Erskine: Now I would like to call Mr. LeRoy.

The Court: Very well. [552]

ALLEN R. LeROY

previously sworn; recalled for defendant under Rule 43(b).

Mr. Lasky: This is Number 44 on the Messenger deposition.

Mr. Erskine: Mr. LeRoy, I am showing you an exhibit, or rather a paper dated October 1, 1948, and I will ask the clerk to mark it for identification.

The Clerk: Defendant's Exhibit R for identification.

(Thereupon the Tague Memorandum referred to above was marked Defendant's Exhibit R for identification.)

Direct Examination

By Mr. Erskine:

Q. I will ask you when you first saw that memorandum dated October 1, 1948?

A. It is my impression about October 2nd.

Q. About October 2nd?

A. Yes; it may have been on the first. However, I apparently did nothing about it until the second.

Q. That is the one marked Defendant Exhibit R for identification? A. That is right.

Q. This memorandum begins with the statement: "It has been noted that checks in sizable amounts have been clearing through the company's regular account written on various California banks." The "company" referred to was the United Produce Company, was it? A. Yes.

(Testimony of Allen R. LeRoy.)

Q. It continues: "We are paying against uncollected funds to present overdrafts." That was a correct statement of the [553] situation at that time, wasn't it?

Mr. Lasky: Just a moment, please. If the Court please, I have permitted preliminary questions to come in without objections and we have gotten directly to one of the counter-claims of the Defendant's answer. I certainly wish to make an objection for the record to the admissibility of all evidence on this subject.

The Court: Very well.

Mr. Lasky: Will your Honor permit me to state the objection briefly?

The Court: Yes.

Mr. Lasky: The point we make is simply this: The purport of the counterclaim is that there was some alleged negligence by the Plaintiff bank in the conduct of its business with the customer, United Produce Company, from which it is sought to be deduced that somehow or other this was a proximate cause of the loss which the Defendant Bank of America sustained when it paid out funds against uncollected checks on the item \$97,000.

We submit to the Court, number one, that bank has no duty with respect to another bank in a situation of this character.

Secondly, that there is not and can be no proximate causal relationship between any alleged negligence of the Plaintiff bank in its conduct towards its own customer, and any loss which the Defendant

(Testimony of Allen R. LeRoy.)

bank may have sustained here, just in the nature of the things, so far as the banks involved. [554]

Secondly, the evidence has clearly disclosed how the Defendant bank came to suffer its own pecuniary loss. It was due to its own negligence occurring after November 10th, when it itself felt that it was not safe in honoring checks drawn upon the Lofendo account until the funds had been collected, and any negligence which may have occurred in Chicago wouldn't reach through and have and causal relationship there.

I think the objection is well taken; I think this is just an open and shut proposition, and we are taking a great deal of time which is getting us nowhere.

The Court: The Court, of course, will reserve a ruling upon your objection and permit the Defendant to proceed with his testimony, and I will expect, of course, some memorandum with respect to the matter to aid me in making a decision on it.

Mr. Lasky: Just to avoid repeating these objections all along——

The Court: The objection goes to the whole matter.

Mr. Lasky: Perhaps to save it for the record, I ought to make a motion to strike, and do now make a motion to strike from Defendant's answer both counter-claims, and then it is understood I have a running objection to all evidence designed to sustain either claim.

(Testimony of Allen R. LeRoy.)

The Court: Yes, it may be so understood, and the Court reserves its ruling.

Now you have mentioned that it going to take a great deal [Balance of sentence missing in [555] copy.] What are the facts? Can't you stipulate to any of these facts?

Mr. Erskine: No, I think they will have to come out in the testimony, your Honor.

The Court: How are you going to prove it? With the officers of that bank?

Mr. Erskine: I am going to prove it by cross-examination of Mr. LeRoy and Mr. Messenger, and I am also going to prove it by the records of the bank.

The Court: All those matters can be stipulated to. I don't see why not.

Mr. Erskine: I don't think my cross-examination of Mr. LeRoy could possibly be stipulated.

The Court: Well, it won't go in in the same manner, Mr. Erskine, but whatever he testifies to, he would, I am sure, with a conference, admit for the purposes of stipulating to the facts.

Mr. Erskine: Well, I—

The Court: I realize that you may want to put it in in a particular way, but it isn't going to be impressive to the Court because it comes out in a particular way. If I get the facts upon which you wish to argue your point can be stipulated to, they should be.

Mr. Erskine: I really think, your Honor—I don't know how long—

(Testimony of Allen R. LeRoy.)

The Court: Are you going to have to introduce a lot of records of the bank in evidence, and argue all about these matters. [556]

Mr. Erskine: Not with this witness. I propose to get the records of the bank in by introducing the depositions. I have got the pages of the depositions—at least I have from one of them, and have the principle one, that of Mr. Messenger, that relates to the records. And I want to put the records of the bank in by introducing the exhibits as explained by those persons of the depositions. I don't even propose to read the depositions; I just want to refer to the pages, and Mr. Lasky can add any additional pages that he wants. But so far as this particular matter is concerned, your Honor, I can only get at it by the cross-examination of Mr. LeRoy and Mr. Messenger—that is, part of it—and I feel that it would be quite prejudicial to our side in this case if I were not permitted to go ahead with my cross-examination. [557]

The Court: Of course if you can't stipulate to the facts, then, of course, you would have to call the witness and cross-examine him; but I can see no reason why an effort to stipulate to the facts should not be made. These are all matters—as I say, this whole case has been brought up to the point of trial—rather, has been handled without taking advantage that the procedure that has been developed for the purpose of eliminating so much of this. Can't that be done, Mr. Erskine?

Mr. Erskine: Well, I don't know, unless they

(Testimony of Allen R. LeRoy.)

are willing to admit what they knew that a kiting operation was going on on October 1st, that they were so advised that a kiting operation was going on; that they made an investigation at that time and a special audit; that that audit gave as an excuse for the kiting operation an excuse which doesn't hold any water at all on the face of it; that the excuse was obviously unsound; that it should not have allayed their suspicion at all; it should have decreased their suspicions, but this witness was not satisfied with the—

The Court: Of course those are conclusions that you will have to argue.

Mr. Erskine: Those are the facts, your Honor, and I propose to prove those facts through this witness. I don't believe that they will stipulate to them.

Mr. Lasky: I certainly won't stipulate to the way you have stated it.

The Court: No, I don't think you will ever get a stipulation [558] like that, because they are conclusions on which you would argue as a result, but certainly if an audit was made, I think counsel would stipulate as to that and all the steps along. I don't see why you can't stipulate to those facts.

Mr. Erskine: If you will stipulate to what I have just stated; but I know he won't, and I am going to prove it.

The Court: All right, I am satisfied he won't stipulate to that either, Mr. Erskine; so go ahead.

Mr. Erskine: Yes, and I am going to show it.

Mr. Erskine: Now what is the last question?
(Testimony of Allen R. LeRoy.)

The Court: It is understood, counsel, that all this testimony goes in under the reserved ruling of the court.

Mr. Lasky: Yes, so I won't be repeating the objection.

The Court: Yes, there is no necessity to keep repeating objections.

Q. (By Mr. Erskine): This statement here, Mr. LeRoy, says, "We are paying against uncollected funds to prevent overdrafts." That was a correct statement of the situation respecting the United Produce Company or their relationship between the United Produce Company and the Merchandise National Bank as of the date of this report, October 1, 1948?

A. That is right.

Q. And it says, "One check has been returned uncollected in the amount of \$22,000." Did you ever see that check?

A. I assume I did; I can't recollect it at the present time, [559] from memory, however.

Mr. Erskine: I will ask that this be marked.

The Clerk: Defendant's Exhibit S, for identification.

(The check referred to was marked Defendant's Exhibit S for identification.)

Q. (By Mr. Erskine): Showing you Defendant's Exhibit S for identification, I will ask you if that is the check referred to in Mr. Tague's memorandum which I have just read to you?

A. Well, frankly, I don't know if it appears to

(Testimony of Allen R. LeRoy.)

be that it is; there was a check returned at that time which brought it to our attention.

Q. You don't recognize this as the check?

A. No, sir, I don't as the definite check.

Q. Now I want to call your attention, Mr. LeRoy, to page 182 of your deposition.

Mr. Erskine: It will be stipulated, will it not, counsel, that this check that I now hold in my hand was marked Defendant's Exhibit 6 for identification upon the taking of the deposition of Mr. LeRoy.

Mr. Lasky: Well, if you tell me it is.

Mr. Erskine: It is.

Mr. Lasky: All right; O.K.

Q. (By Mr. Erskine): I will call your attention, Mr. Witness, to the fact that this check was marked Defendant's Exhibit No. 6 for identification upon the taking of your deposition. [560]

A. Yes, sir.

Q. On page 182 of your deposition you stated this:

“Mr. Erskine: Now I will ask the reporter to mark this draft please as Defendant's Exhibit No. 6 for identification.”

And skipping:

“Q. Mr. LeRoy, I show you Defendant's Exhibit No. 6 for identification, and I will ask you if that check or that item was ever called to your attention?

“A. My impression is that it was, yes.

“Mr. Lasky: Well, that is all.

(Testimony of Allen R. LeRoy.)

"The Witness: All right.

"Mr. Lasky: You have answered the question.

"The Witness: All right.

"Q. (By Mr. Erskine): When?

"A. Sir?

"Q. What is your best recollection as to when it was called to your attention?

"A. Either the last days of September or the first of October."

You gave that testimony, Mr. LeRoy?

A. As I remember it, yes, sir. As you read it from the deposition, I will assume the responsibility for it.

Q. So that this check that has been marked on this trial as Defendant's Exhibit S for identification was called to your attention during the latter part of September or the first part [561] of October, 1948, is that right? A. Yes, sir.

Q. Who called that check to your attention?

A. Frankly, I don't remember who called it to my attention; it was called as a result of its being returned—either the return teller or one of the assistant operating officers. I don't recall who returned it.

Q. Before I come to that, Mr. LeRoy, I will ask you if it is not a fact that this check, Defendant's Exhibit S for identification, is the check referred to Tague's memorandum of October 1st, in which he says, "One check has been returned un-

(Testimony of Allen R. LeRoy.)

collected in the amount of \$22,000"? That is correct, isn't it?

A. Well, I assume that it is. I think it has been stipulated that they are one and the same items. Yes, it is. He says approximately 22.

Q. You say either the return teller, called that check to your attention or an operation officer of the bank? A. Somebody in the books.

Q. It wasn't Mr. Collins?

A. It might have been, I don't remember.

Q. Will you say that it wasn't Mr. Collins?

A. Well, I wouldn't say it wasn't. I do not recollect who called it to my attention.

Q. Do you remember, as a matter of fact, Mr. LeRoy, that that check was called to your attention by Mr. Collins and that you [562] and he had a discussion with respect to the check and with respect to the account?

A. I do not recollect that at all.

Q. Will you deny that it occurred?

A. I will not deny it, but I do not remember it.

Q. Who was Mr. Collins at that time?

A. Cashier at the bank.

Q. He was the cashier of the Merchandise National Bank at the end of September and in October or in September and October of 1948, is that right? A. Yes, sir.

Q. Is he any longer with the bank?

A. He is not.

Q. Do you know what his present position is?

A. Yes, sir.

(Testimony of Allen R. LeRoy.)

Mr. Lasky: If the Court please, this is hearsay, what he knows. I think it is irrelevant.

The Court: What difference does it make? [563]

Q. (By Mr. Erskine): I will ask you this, Mr. LeRoy: Isn't it a fact that you and Mr. Collins had a conversation about that check and the account, and that in that conversation Mr. Collins told you that the check had been called to his notice upon its return; that he had thereupon examined the account and that he believed that a kiting operation was going on in the account?

A. I do not recall such conversation with Mr. Collins.

Q. Will you deny that such a conversation occurred?

A. I do not recall it. I will not deny it; it is possible.

Q. Well, now, Mr. LeRoy, that does not occur every day in the banking business, does it?

A. No, sir.

Q. It is not a usual, routine affair, is it?

A. No, sir.

Q. The cashier of your bank is a fairly important official in the bank, is he not?

A. Yes, sir.

Q. And if Mr. Collins had called to your attention this check and had told you that he had examined the account of the Merchandise National Bank and its transaction and that he believed that a kiting operation was going on, do you think that

(Testimony of Allen R. LeRoy.)

you would remember it or that it would escape your memory?

A. I don't think—I think I would remember it had it been stated definitely there was a kiting operation; but I don't [564] think anybody could state definitely there was a kiting operation at that time. And investigation was made.

Q. I am not asking you whether or not Mr. Collins stated definitely whether a kiting operation was going on; I am asking you whether or not he told you that he suspected that a kiting operation was going on?

A. I don't remember talking to Mr. Collins in reference to this transaction at all.

Q. But you will not say that no such conversation took place? A. No, I couldn't.

Q. I will ask you whether or not it is not a fact that you and Mr. Collins went to see Mr. Redheffer and discussed this transaction, the United Produce Company account, with him? Do you remember any such conversation?

A. I remember a conversation with Mr. Redheffer, but not Mr. Collins' participation in it.

Q. Mr. Redheffer was the president of your bank at that time? A. Yes, sir.

Q. Mr. Redheffer is now chairman of your board, isn't that right? A. No, sir.

Q. What is that? A. No, sir.

Q. When he cease to be chairman of your board? Mr. Lasky: I object to that as immaterial. [565]

(Testimony of Allen R. LeRoy.)

Mr. Erskine: It has a particular purpose, your Honor.

The Court: As to whether he is now president of the board?

Mr. Erskine: Whether he is now chairman of the board.

The Court: It doesn't make any difference whether he is or not.

Q. (By Mr. Erskine): I will ask whether or not it is not a fact, Mr. LeRoy, that in the conversation between you and Mr. Collins and Mr. Redheffer—or, rather, I will ask you whether or not it is not a fact that you, Collins and Redheffer had a conversation towards the latter part of September of 1948 in which Mr. Collins told Mr. Redheffer in your presence that he strongly suspected—or let us say, that he suspected that a kiting operation was going on in the account of the United Produce Company.

A. I do not remember that conversation that you are calling to my attention. I had a talk with Mr. Redheffer. I do not remember Mr. Collins participating in it, and I do not remember strong, definite statements about a kite being suspected, because bankers as a rule are a little careful about making accusations of that kind.

Q. If you don't remember, strong, positive statements, do you remember any statements by Mr. Collins to the effect that there might be a kite in the United Produce Company account?

(Testimony of Allen R. LeRoy.)

A. I do not remember Mr. Collins—— [566]

Q. Wait a minute; let me finish my question. Do you remember such a statement?

A. I don't remember Mr. Collins making any statement about it.

Q. Will you say that Mr. Collins did not make such a statement to Mr. Redheffer in your presence?

Mr. Lasky: If the Court please, the question has been asked and answered several times.

Mr. Erskine: No, it has not.

Mr. Lasky: The witness says he doesn't remember.

The Court: He says he doesn't recall any conversation between Collins, Redheffer and himself.

Mr. Erskine: I want to find out if he will deny positively that such a conversation took place.

The Court: That is just one of those things, isn't it, Mr. Erskine, if you can't remember anything about it—he doesn't recall any conversation at all. You want him to say that no such conversation took place. He said he couldn't do that, didn't he?

Mr. Erskine: He said that he couldn't deny that such a conversation took place between him and Collins, but he has not yet made the same statement about a conversation between Collins, Redheffer and himself.

The Court: All right; go ahead.

A. I can't deny—— [567]

(Testimony of Allen R. LeRoy.)

Q. (By Mr. Erskine): You——

The Witness: Pardon me.

Q. (By Mr. Erskine): You won't deny that Mr. Collins in your hearing told Redheffer that he suspected that a kiting operation was going on in the account towards the end of September, '48? You won't deny that, as I understand you?

A. I won't deny it, but I don't recall it.

Q. Yes.

A. It might have, but it is peculiar I wouldn't recall it.

Q. I admit it is peculiar. Now, Mr. LeRoy, you do recall, however, that you and Mr. Redheffer did have a discussion with respect to this account towards the end of September of 1948, is that right?

A. I would say that it was about October 2nd, from that memorandum; perhaps prior thereto.

Q. Isn't it a fact, Mr. LeRoy, that you had your discussion with Mr. Redheffer before Tague made his investigation? A. I may have.

Q. What is your best recollection with respect to that?

A. I assume probably we did talk it over.

Q. You assume, and it is your best recollection, let us say, that prior to October 1st, the date of Tague's report, you and Mr. Redheffer had talked with respect to the United Produce Account? That is your testimony, is it?

A. I would assume that that was correct, [568] yes.

(Testimony of Allen R. LeRoy.)

Q. What did you and Mr. Redheffer say with respect to United at that time?

A. As to the United Produce account and the fact that they were drawing against uncollected funds, and the reason for those checks appearing in their regular deposit account. [568-A]

Q. You discussed the fact that checks were being deposited, checks drawn by Lofendo to the order of United Produce Company were being deposited to the credit of the United Produce Company, and that at the same time the United Produce Company was drawing checks to the order of Lofendo which were being debited against the account? You discussed that fact?

A. That fact, yes. and the other checks which were being handled in the manner.

Q. You discussed that fact, the checks on both sides to which I have just referred, also the fact that the United Produce Company was drawing heavily against uncollected funds, did you?

A. Yes, sir.

Q. You and Mr. Redheffer in that conversation agreed with one another that the special investigation of the books of United Produce Company should be made for the purpose of determining what the situation was, is that right?

A. That is right.

Q. With respect to those two matters: First, the checks on both sides and the drawing on uncollected funds? A. That is right.

Q. And then you, pursuant to those instructions

(Testimony of Allen R. LeRoy.)

told Mr. Tague, the auditor of the bank, the outside auditor of the bank, to go down to the books of the United Produce Company and make a special examination of them for the purpose of investigating those two facts? [569]

A. He was told to do it.

Q. He was told to make that investigation?

A. Yes, sir.

Q. Then, Mr. LeRoy, Mr. Tague made this report dated October 1st, 1948, and presented it to Mr. Rudolph as a result of his investigation?

A. That is correct.

Mr. Erskine: I would like to introduce this in evidence, if the Court please.

Mr. Lasky: I suppose my running objection goes to the document.

The Court: Yes, and they will also be admitted under a reserved ruling of the Court with reference to all of them.

Mr. Erskine: I would like to make this observation, if the Court please, while that counsel examined the witness of the Bank of America at some length, and for the purpose of showing negligence and their suspicion with respect to a kite, or what he hoped to be was a suspicion with respect to a kite, but he objects to my doing the same with his witness.

Mr. Lasky: The relevance is quite different.

The Court: We need not argue the matter now because the Court is not prepared to rule on the matter.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: I will ask you, Mr. LeRoy, if you regarded Mr. Tague's memorandum of October 1st, which has been marked Defendant's Exhibit R, as a satisfactory explanation of the [570] checks on both sides and the drawing of uncollected funds by the United Produce Company, did you?

A. Personally I was not completely satisfied.

Q. Well, it is a fact, though, that you have already told Duncan, you have already testified that when you saw Duncan on the morning of November 18th, you told Duncan that early in October the Merchandise had noticed a volume of items going through the account, which had made them suspicious, and that it had checked up to the best of its ability on the United Produce books and at that time had obtained what appeared to be a satisfactory answer to their questions. You have already testified to that.

A. Yes, I told them that.

Q. You told Mr. Duncan that, is that right?

A. Yes, sir.

Q. But you now say that you did not find Tague's report of October 1st entirely satisfactory to you personally, is that right?

A. That is correct.

Q. Was it satisfactory to Mr. Redheffer?

A. Yes, sir.

Q. But it was not satisfactory to you, is that right? A. Not completely.

Q. I ask you, Mr. LeRoy. if you did not testify

(Testimony of Allen R. LeRoy.)

as follows when your deposition was given, page 230: [571]

"Now, I believe that you referred to this memorandum, Defendant's Exhibit 44 of Tague's which should have been Messenger's—it is the same thing as this October 1st report—and said that you regarded that memorandum as a satisfactory response to the inquiry that you had made, to which the memorandum was a response, is that correct?

"Yes, a satisfactory explanation.

"Q. Satisfactory explanation?

"A. Yes.

"Q. It was a satisfactory explanation to you, was it, to the bank? A. Yes.

"Q. Was it to you?

"A. We accepted it.

"Q. I am asking you, Mr. LeRoy?

"A. Naturally it was satisfactory to me if he accepted it.

"Q. I am asking you whether or not the memorandum is a satisfactory explanation to you as a banker? A. Yes.

"Q. And did you tell Mr. Tague and the other officers? A. I don't know."

Did you give that testimony?

A. As I remember, yes, sir. [572]

Q. You testified a few minutes ago that it was not satisfactory to you personally. Now, what is right? What you testified to when your deposition was taken or what you have just stated?

(Testimony of Allen R. LeRoy.)

A. I would say they were in conformity, the two things. It was satisfactory to the bank and it became satisfactory to me because the majority of the people handling it were satisfied. and I accepted it.

Q. But you were really not satisfied?

A. I did not say that I was not satisfied. I was not completely satisfied with it, and I think the deposition concurs in that.

Q. What the deposition says will speak for itself.

The Court: You were asking him which one was true and he is answering it for you. In other words I do not think you should have asked the question. That is a matter for the Court to determine.

Mr. Lasky: Personally I think the witness is correct when he says the two are in conformity.

The Court: That may well be. Sometimes when you ask questions that should not be asked, you get answers you do not want to get.

Mr. Erskine: Yes, that is true but let me read the testimony again.

Mr. Lasky: This time, counsel, distinguish the questions from the answers.

The Court: Is this the same testimony? [573]

Mr. Erskine: Yes.

The Court: Don't read it again. I have heard it. So has the witness. Why go over it again now? It is in the record. [573-A]

(Testimony of Allen R. LeRoy.)

Mr. Erskine: He says unequivocally the memorandum was satisfactory.

The Court: It is in the record that way. Don't do it again and again. I have some intelligence.

Mr. Erskine: I am just—

The Court: I know, counsel, but why go over it again? It was read once, the answer is there, "yes," and then he makes his explanation. That is there. There is no use going over it again.

Q. (By Mr. Erskine): Well, now, Mr. LeRoy, coming back to this matter of this memorandum, it says here that it has been noted that checks in sizable amounts are clearing through the company's regular accounts drawn on various California banks. You knew that those checks were checks of Lofendo's drawn on the Bakersfield branch? You knew that at the time that this report came to your notice about October 1st, didn't you?

A. Some of them were not.

Q. Most of them were; that is correct, isn't it?

A. As I remember it, the most of them, but there were other checks, too.

Q. Now, the memorandum goes on to say, "The Company's records reveal that this activity stems from three accounts which are carried on the books as pre-season advances." Now, those three accounts were referred to in the memorandum as the [574] Lofendo, Mazzi Farms and Jack's Fruit Company. That is a fact, isn't it?

Mr. Lasky: The memorandum speaks for itself, counsel.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: It is just preliminary.

The Witness: I would be guessing.

Q. (By Mr. Erskine): And then this memorandum says, "However, these accounts—that is, the three accounts, the Mazzi Farms, Jack's Fruit and Lofendo—now record brokerage transactions engaged in by United Produce with the grower acting as their agent." You understood that to mean that the grower referred to in that sentence, which is the second sentence of the second paragraph, were the three people just mentioned, Mazzi Farms, Lofendo, and Jack's Fruit Company?

A. I assume that is correct, yes, sir.

Q. That is correct, isn't it?

A. I will say it was.

Q. Now, the memorandum goes on to say this:

"Mr. Gassman explained that lots of grapes are produced by the grower for cash."

Again the word "grower" refers, as you understood the term, to Mazzi Farms, Jack's Fruit Company or Lofendo; that is correct, is it?

A. Yes, sir.

Q. It says, to go back, "Mr. Gassman explained that lots of grapes are produced by the grower for cash. United Produce [575] is immediately advised of the purchase and forwards the cash. The car or cars are then shipped to the customer of the agent, and upon collection of the amount due, the agent or grower sends his check to United Produce." That was the explanation given by Tague

(Testimony of Allen R. LeRoy.)

in his memorandum to answer the fact that the checks appeared on both sides; that is correct, is it not? A. Yes, sir.

Q. Now, you understand that when I say the checks on both sides, I mean checks being deposited to the credit of United Produce Company drawn by Lofendo and checks drawn by the United Produce Company to the order of Lofendo and charged against the United Produce account; you understand that? A. Yes, sir.

Q. Now, I will ask you whether or not you understood that explanation that I have just given to you or just read to you to mean this, that the United Produce Company would purchase a car of produce for Lofendo and that it would reimburse, it would send Lofendo a check for the purchase, and that Lofendo would then ship the car and collect the sales price of the car and reimburse the United Produce Company with his check? That is what this says, does it not?

Mr. Lasky: Won't it speak for itself?

The Witness: I think it says that. I think it says that he sold it for cash. but that is immaterial. He was reimbursed.

Q. (By Mr. Erskine): "United Produce is immediately advised [576] of the purchase and forwards the cash." You meant forwards the checks, did you not?

Mr. Lasky: The witness did not write the memorandum.

(Testimony of Allen R. LeRoy.)

The Court: That is not the witness' memorandum.

Mr. Erskine: I want to find out what he understood the memorandum to mean, your Honor.

Q. You did not understand it to mean that the United Produce sent Lofendo currency for the price of the car, did you?

A. No, I knew they did not.

Q. You understood it to mean that the United Produce Company sent Lofendo a check?

A. Yes.

Q. And then Lofendo shipped and sold the car, collected the proceeds and sent his check to United Produce Company? That is what you understood it to mean? A. Yes, sir.

Q. Now, at the time this memorandum of October 1st, 1948, was made, you were the loaning officer of the Merchandise Bank in charge of the United Produce Account, were you not?

A. Yes, sir, at that time.

Q. You were there temporarily during Mr. Reichwine's absence, is that right?

A. That is right.

Q. Mr. Reichwine was ordinarily in charge of the account, was he? [577] A. Yes, sir.

Q. Mr. Reichwine had gone away on his vacation about September 20th, is that right?

A. Yes, about then, about the 18th or 20th.

Q. And continued away until about October 18th, is that right? A. That is correct.

(Testimony of Allen R. LeRoy.)

Q. And you were in direct charge of the account during the time Mr. Reichwine was away?

A. Yes, sir.

Q. And you had been familiar with the account for some time prior to the time Mr. Reichwine left on his vacation? A. In general, yes, sir.

Q. And you knew the business of the United Produce Company both from your immediate experience as a loan officer in charge of the account temporarily while Reichwine was away and from your general acquaintance with the account prior to his departure for his vacation?

A. I thought I did.

Q. If your understanding of this explanation given in Tague's memorandum was correct, that is, if Lofendo was buying, and if the United then sent its checks for the amount of the purchase, and if Lofendo then shipped and sold and collected the purchase price and sent his check to United for the purchase price, you knew if that was going on, Mr. LeRoy, that the United Produce Company was not handling the produce at all, [578] but Lofendo was; that is correct, isn't it?

A. Let me get this straight. Counsel has me temporarily confused. The United Produce Company sent the money to Lofendo first?

Q. It says here: "Lots of grapes are purchased by the grower for cash." The grower is Lofendo, that is correct, is it not? A. Yes, sir.

Q. Or Mazzi Farms or Jack's Fruit Company, either one of the three? A. All right.

(Testimony of Allen R. LeRoy.)

Q. "United Produce Company is immediately advised of the purchase and forwards the cash." That is to Lofendo. A. Yes.

Q. "The car or cars are then shipped to the customer of the agent"—Lofendo—"and upon collection of the amount due, the agent sent his check to the United Produce Company."

A. That is right.

Q. That is what it says? A. Yes.

Q. Now, I am asking you, Mr. LeRoy, if that was true; it was the agent or Lofendo who was actually buying and shipping the merchandise; that is correct, is it not?

Mr. Lasky: If the Court please, what is the materiality of this witness' understanding?

The Court: If that is so, it is a deduction that the Court can make from the document, isn't [579] that so?

Mr. Erskine: That is right, your Honor, but I want to show that in view of the witness' knowledge of the United Produce Company's business, he could not possibly have accepted that as a satisfactory explanation of what was going on, and that nevertheless he permitted it or the bank permitted it to go on.

The Court: Very well, continue.

A. That is correct, counsel.

Q. (By Mr. Erskine): And the agent or Lofendo was actually receiving the proceeds of the sale; that is correct, is it not? A. Yes, sir.

Q. And the agent or Lofendo was actually ship-

(Testimony of Allen R. LeRoy.)

ping the car and handling the bill of lading and getting the delivery or issuing a delivery order for the car; that is correct, isn't it?

A. I wouldn't know what he did with it. He was handling the sale of it.

The Court: May I interrupt you a moment? As you were assigning a description to Lofendo in the memorandum, you assigned him as an agent.

Mr. Erskine: That is how he is referred to.

The Court: And as a grower.

Mr. Erskine: And as a grower. The terms are used synonymously.

Mr. Lasky: No, they are not used synonymously.

Mr. Erskine: It says "by the grower, parenthesis or agent."

Mr. Lasky: But he has listed elsewhere three different [580] people, and some might have been growers and some might have been agents.

The Court: That is what I wanted to understand. For the purposes of your cross-examination you are giving him the appellation of agent and grower?

Mr. Erskine: Yes, sir, one and the same thing.

Q. That is what you understood this to mean, was it not, Mr. LeRoy? A. Yes, sir.

Q. From your knowledge of the situation, Mr. LeRoy, you knew that the United Produce Company was discounting drafts in large sums drawn by it on various people to whom it purported to ship merchandise; that is correct, is it not?

A. Yes, sir.

Q. And you knew that accompanying those drafts

(Testimony of Allen R. LeRoy.)

or when they were discounted at the bank the United Produce Company would give the bank what is called a delivery order directing the delivery of the car to the person named in the draft; that is correct, is it not? A. In some cases, yes.

Mr. Lasky: If the Court please, this has gotten even beyond I understood the answer to bring up. I do not see what bearing this has on the claim that somehow through negligence we permitted or knew a kite was going on. This has got me lost. I object to its materiality. [581]

The Court: I confess I am not following through myself. What is the purpose here?

Mr. Erskine: The purpose is this, your Honor: the explanation of the kite was, as the witness stated, as given in this statement by Tague in his report. The statement is that the reason for the checks on both side was this:—

The Court: As explained by that draft.

Mr. Erskine: Yes. Lofendo—we will take Lofendo as the grower or agent—Lofendo bought some merchandise. The United Produce Company reimbursed him for the purchase. Lofendo then shipped the merchandise, sold it, got the proceeds, and reimbursed the United Produce Company. Now, if that sort of a situation was presented it would mean that the United Produce Company was not selling the merchandise, it was not shipping the merchandise, the proceeds of the sale would not become due to it, it would have nothing to do with the transaction except to finance it by paying Lofendo the

(Testimony of Allen R. LeRoy.)

price. Now, I want to show from this gentleman's knowledge of the business that the United Produce Company was carrying on, that that explanation could not possibly have held a drop of water to it. That is the purpose.

Mr. Lasky: It could not do what? I did not understand what you last said.

Mr. Erskine: I said that from Mr. LeRoy's knowledge of the business in which the United Produce Company was engaged, [582] the fact that it was selling the produce, that it was shipping, that it was collecting the proceeds, the fact that it was doing all those things made it absolutely impossible for him to believe this explanation, which stated that Lofendo was doing it.

Mr. Lasky: They had other accounts that they were selling directly through.

The Court: You mean to say that because he knows in other matters they handled business deals in a different manner, that he was to understand that it could not possibly be handled this way?

Mr. Erskine: Yes, your Honor. These brokerage transactions as the report stated, amounted to very substantial sums of money. As this report states, in the three months——

The Court: Yes, but do you mean that because the witness knew that the United Produce Company carried on some business transactions differently than it stated in the memorandum, your purpose is then for the Court to draw the conclusion that what

(Testimony of Allen R. LeRoy.)

appears in the memorandum could not possibly have been believed?

Mr. Erskine: That is right.

Mr. Lasky: Because they had other accounts one way, they could not have one account a different way.

The Court: I do not think it follows.

Mr. Erskine: I think it at least gives rise to inference [583] in my opinion. The report states that these brokerage transactions were carried by the United Produce Company as pre-season advances, as the report states. During the three months of July, August and September it shows that the amounts paid by the United Produce Company in these brokerage transactions came to the huge total of \$1,976,285.62, that the receipts from those transactions carried on in the way described in the memorandum came to \$1,858,010.33. Now, I say from this gentleman's knowledge of the United Produce Company it was absolutely impossible for him to find satisfactory a report to the effect that transactions in those amounts were carried on in the way in which the memorandum describes them. That is the purpose.

The Court: Well, of course, I can't follow. It just is not seeping through on me, counsel. Your contention is that this witness knew of certain transactions of the United Produce Company, understood how the United Produce Company carried on certain of its business.

Mr. Erskine: He knew, your Honor, that all of

(Testimony of Allen R. LeRoy.)

its accounts receivable were being assigned to the bank as collateral. He knew that the United Produce Company was discounting drafts in large sums of money with the bank every month.

The Court: He knew that so much of the business of the United Produce Company was carried in a particular manner, that it was impossible for the business between the United Produce Company and Lofendo to be carried on in the manner described, is [584] that it?

Mr. Erskine: That is right, business in these large figures.

Mr. Lasky: The argument just does not make any sense. They sent out an investigator to find out why the stuff is not coming into the assigned receivables account. And an auditor reports that here are three accounts of a different character of business. Does that mean the witness it to conclude there just could not be three accounts like this? It does not add up logically.

The Court: Counsel can go ahead with his theory and present his evidence.

Q. (By Mr. Erskine): At any rate, Mr. LeRoy, to get back to my line, this report states, does it not, that these transactions in which the checks appeared on both sides, these pre-season advances, as the designation on these brokerage transactions appears, aggregated during the months of July, August and September as advances to the grower \$1,976,-285.62, and that the receipts came to \$1,858,010.33; that is correct, is it not?

(Testimony of Allen R. LeRoy.)

A. Well, it was a very large amount. I will accept that. That is correct.

Mr. Lasky: I will stipulate that is what it says on the paper.

Mr. Erskine: Yes, that the brokerage transactions carried as pre-seasonal advances giving rise to checks on both [585] sides amounted to those sums.

Q. Now, Mr. LeRoy, the United Produce Company was in the business of selling produce, was it not? A. Yes, sir.

Q. Shipping it? A. Yes, sir.

Q. Assigned accounts receivable arising out of the shipments to the bank as collateral?

A. Yes, sir.

Q. And discounting drafts for the purchase prices of produce sold by it; that is correct, is it not?

A. That is correct.

Mr. Lasky: Why must the witness be asked questions on which we have stipulated?

The Court: It is all stipulated.

Mr. Erskine: It shows the knowledge of the witness, according to my feeble intelligence.

Q. But you understood, did you, Mr. LeRoy, that so far as these transactions were concerned, referred to in this report, in which the pre-season advances came to the sum that I have mentioned, that is, the amounts sent out to the grower and the receipts to the United Produce Company came to the sum that I was mentioning, that the United Produce Company was not doing any of these things?

(Testimony of Allen R. LeRoy.)

A. They were merely taking a chance on that, acting as brokers, [586] which was a part of their business.

Q. They were financing the transactions, is that right?

A. Not in total, all at the same time, but they were not strictly pre-season advances, but they put the money out in order to enable Lofendo to buy them and then they were reimbursed and for that—they might have got a small commission.

Q. And in that transaction, Mr. LeRoy, no accounts receivable was created in favor of the United Produce Company?

A. Not where they would be handled purely as a brokerage.

Q. And the bank was taking as security for these loans the assignments of accounts receivable, all accounts receivable?

A. From other transactions.

Q. And the bank was willing to permit the United Produce Company to finance transactions aggregating in those three months practically two million dollars without the bank receiving any collateral out of the transaction, is that right?

A. They would not get any collateral if they were handled as brokerage transactions.

Q. I am asking you, Mr. LeRoy, the advances made by the United Produce Company in these transactions, according to this report, amounted to two million dollars? A. That is right.

Q. In the three months, July, August and Sep-

(Testimony of Allen R. LeRoy.)

tember, the United Produce Company got no accounts receivable out those transactions which it could assign to the bank to secure the loans [587] being made?

A. I do not know that they didn't get any—

Q. What is that?

Mr. Lasky: Just a moment. I would like to have that question read so I will understand what it is all about.

Mr. Erskine: If you would not interrupt me, counsel—I think I should be permitted to go along as best I can. It may not be very good but it is the best I can do.

The Court: The Court will determine this matter.

(The last question was read by the reporter.)

Mr. Erskine: Your answer to that is no, it could not have?

A. It could have gotten some; where there were brokerage transactions, none.

Q. How could it have gotten any accounts receivable out of these transactions if the agent or grower was making the sale and collecting the proceeds?

A. They could have been through a third party, and the transaction come in and the money collected. It was confused it would be possible. [588]

Mr. Lasky: I will stipulate that there was no account receivable that United Produce could assign.

(Testimony of Allen R. LeRoy.)

The Witness: From those transactions.

Mr. Erskine: You will stipulate that in these transactions during those three months amounting to advances by the United Produce Company to the grower or agent practically two million dollars, that in those transactions no accounts receivable were created which were assigned to the bank as collateral?

Mr. Lasky: I said I will stipulate that if there was that kind of transaction where there is nothing owing to the United Produce Company, then the United Produce Company had no account to assign.

Q. (By Mr. Erskine): Mr. LeRoy, when you saw this report showing that the United Produce Company was financing transactions of that sort and was laying out in these transactions for the period of three months practically two million dollars, did you consider that a satisfactory report?

A. Report covering those transactions perhaps, but if counsel will go further, he will find out what our remedy for that was to be.

Q. I am, first of all, inquiring into your state of mind with respect to this report and whether or not this explanation was a satisfactory explanation of the checks on both sides?

A. It covered, yes, sir.

Q. You regarded it as satisfactory? [589]

A. The bank did; and in that I will say the committee handling it, Mr. Redheffer and myself.

Q. You were in charge of the account?

(Testimony of Allen R. LeRoy.)

A. I was. And if counsel will go on further he will find out what remedy I suggested.

Q. I am coming to that. Now when Tague submitted this report to you Mr. LeRoy, did you ask him what he understood it to mean, that is, that portion of it dealing with these brokerage transactions and the checks on both sides?

A. You mean did I break it to pieces the way you have done? No, I didn't.

Q. I didn't ask you that. I asked you whether or not you asked Tague what the report meant, according to his understanding?

A. I asked him for an explanation about it, yes.

Q. And did you receive a satisfactory answer from Tague to that inquiry?

A. He answered just about what is in the report, counsel.

Q. Did you understand what he had to say in answer to your inquiry?

A. I understood what he had to say, but frankly, I didn't understand the full transaction, no.

The Court: I think the court will stand in recess for ten minutes.

(Recess.)

Mr. Erskine: Now, will you read the last question and [590] answer, Mr. Reporter?

(Reporter read the last question and answer.)

Q. (By Mr. Erskine): In other words, what I understand you to say by that answer is that you did not understand Mr. Tague's explanation?

(Testimony of Allen R. LeRoy.)

A. That's right.

Q. I believe that you have said that you asked Tague to make a complete investigation of the books because you wanted an explanation of the checks on both sides; that is what you testified to as I have understood you. A. That is correct.

Q. And when you gave those instructions to Tague you told him that you wanted an investigation of the entire situation, did you not?

A. I didn't give the instructions to Mr. Tague; Mr. Rudolph did. I talked to Mr. Rudolph.

Q. On page 187 of your deposition the testimony you gave is as follows:

"Q. Did you take any action with reference to the account after this Defendant's Exhibit 6 was called to your attention?

"A. I did.

"Q. What was that action?

"A. Investigation as to the amount of outstanding uncollected items, and I also sent Mr. Tague to the office [591] of the United Produce Company to investigate the whole situation with respect to any checks which were appearing payable to their order from California."

You gave that testimony?

A. I accepted that as what was done, yes. I might have done it personally or through Mr. Rudolph. He was sent down there at least. [592]

Q. At any rate, Tague was sent down there to investigate the whole situation, was he?

(Testimony of Allen R. LeRoy.)

A. That is correct.

Q. And then when Tague made his report, as I understand you, you either couldn't understand it or you didn't find it entirely satisfactory; that is right, isn't it?

A. That is indicated because there were other measures that were taken there at the time.

Q. All right. After you considered Tague's report you asked Mr. Rosenthal of United Produce Company to come into the bank to have a talk with him, did you? A. Yes, sir.

Q. And that was on October 2nd, that you asked Mr. Rosenthal to come in, and he appeared on October 4th as indicated by the memorandum that appears at the bottom of this statement?

A. That was the way I remember it, yes, sir.

Q. Is that correct? A. Yes, sir.

Q. That handwriting appearing at the bottom of this memorandum of October 1 is your handwriting?

A. Yes, sir.

Q. And Mr. Rosenthal came in to see you, did he, Mr. LeRoy? A. Yes, sir.

Q. Tell us what conversation you had with Mr. Rosenthal at that time? [593]

A. Mr. Rosenthal I immediately took over to Mr. Redheffer, and the three of us talked about the entire matter, and in the conversation Mr. Redheffer told Mr. Rosenthal that we wanted to go along and help him work out the situation, and I suggested as indicated at the bottom of the report there, that arrangements be made to allow him to use the funds

(Testimony of Allen R. LeRoy.)

immediately through the use of telegraph transfers.

Q. In that conversation did Mr. Rosenthal tell you what this report says: That Gassman told Tague substantially about the same thing about the explanation of the checks on both sides?

A. He reiterated—

Q. What is that? A. Pardon me?

Q. I didn't get that.

The Court: He interrupted you.

Mr. Erskine: Pardon me.

Q. Did Mr. Rosenthal in his discussion with you and Mr. Redheffer tell you, in explanation of the checks on both sides, substantially the same *time* that according to the Tague report that Mr. Gassman told Tague.

A. As I remember it, yes, sir.

Q. And what did you reply to Mr. Rosenthal when he told you that, Mr. LeRoy?

A. If I remember correctly, I told him I didn't understand it.

Q. I will ask you if you didn't give this testimony at page 151 [594] of your deposition.

“Q. Tell us the conversation between you and him at that time.

“A. In substance it was that he said that they paid out these funds for grapes, and then they sold and the proceeds were received by their agent, who was one of the three people referred to, and the agent remitted the money to them.

“I said, ‘Well, that is very nice, if that the

(Testimony of Allen R. LeRoy.)

case, but have those funds deposited in the Bank of America branch for the credit of the Merchandise National Bank of Chicago, for the United Produce Company, and they will arrange for telegraphic advice to us, and the funds will be immediately available.' ''

Is that the testimony you gave?

A. Yes, sir.

Q. When you said to Mr. Rosenthal: "Well, now, that is very nice, if that the case," did you believe the explanation he was giving you?

A. I didn't understand it.

Q. But at that time you did tell Mr. Rosenthal that you wanted the United Produce Company whenever it was to receive a check drawn on a California bank for funds, you wanted those funds deposited to the credit of your bank and the California bank [595] and you wanted advice of that fact wired by the California bank to your bank?

A. I did if they were to make immediate use of the funds, yes, sir.

Q. That is what you told Mr. Rosenthal that you wanted done? A. Yes, sir.

Mr. Erskine: Have you got Mr. Messenger's memorandum of October 6th? It was Exhibit 43b upon the taking of his deposition?

Mr. Lasky: You are not referring to the memorandum of Mr. Messenger; you are referring to something marked as an exhibit on his deposition.

Mr. Erskine: Yes, that is right.

(Testimony of Allen R. LeRoy.)

Mr. Lasky: 43a.

Mr. Erskine: 43a and b. These are the same thing, aren't they?

Mr. Lasky: Yes.

Mr. Erskine: Yes, I see, the same thing. One has initials and the other not. That's right.

Q. Did the United Produce Company carry out those instructions, that whenever they wanted to draw against uncollected funds arising out of checks drawn on the California bank, or whenever they wanted to draw on such funds, that they should have the funds deposited to the credit of the Merchandise Bank and the California Bank and the Merchandise Bank advised by wire? Did [596] Mr. Rosenthal, or United Produce Company, I mean, carry out those instructions?

Mr. Lasky: Just a moment. I object to that question as assuming something that he hasn't said. He is referring to something as "instructions." The witness has testified to no instructions; he has testified to a procedure that he suggested be followed.

The Court: Yes, that's right.

Mr. Erskine: Substituting "procedure that you asked to follow" for the words "instructions" give your answer to the question with that substitution.

A. Mr. Rosenthal never to my knowledge made any such arrangement.

Q. But the United Produce Company continued after October 1st to draw on uncollected funds, did it not, until, say, October 18th or thereabouts?

A. On October 18th as I remember it, yes, sir.

(Testimony of Allen R. LeRoy.)

Q. And while it was drawing on uncollected funds the arrangement that you suggested with respect to telegraphic advice was not put into effect?

A. No, sir; I think he was given a week in the first place, and then an additional week. I think the records show that.

Q. I show you a paper that was marked on the Chicago depositions as Defendant's Exhibit 42-b on the taking of the Messenger deposition, which appears to consist of three memorandums, [597] October 6th, 11th and 14th, and I will ask you if that memorandum or that sheet shows memorandums prepared by you as of those three dates?

Mr. Lasky: Can't we stipulate that it does?

Mr. Erskine: All right.

The Witness: They do.

Mr. Erskine: I will accept the stipulation, certainly.

I will ask that this be marked for identification.

Mr. Lasky: On all of these documents, Mr. Erskine, we can stipulate what they are.

Mr. Erskine: I want the witness to take a look at that. I have a few questions to ask about them.

The Clerk: The Defendant's Exhibit T for identification.

(The sheet of paper containing the three memorandums referred to was marked Defendant's Exhibit T for identification.)

Mr. Erskine: So according to this memorandum,

(Testimony of Allen R. LeRoy.)

Mr. LeRoy, you had another conversation with Mr. Rosenthal on October 6th in which you told him that your bank, the Merchandise Bank, could arrange to have these funds deposited in the Bank of America direct to our credit and United Produce Company advised, and Mr. Rosenthal stated that he would get the matter adjusted within one week, October 13, 1948, so that future drawing on uncollected funds would not be necessary. That was what was said between you and Rosenthal on that day, October 6th, was it?

A. According to the memorandum, yes, sir, and such a conversation [598] was had.

Q. That is your best recollection of what took place? A. Yes, sir.

Q. There are initials immediately following that, "F U 10/13/48." That means "Follow up on October 13, 1948," doesn't it? A. Yes, sir.

Q. On October 13, 1948, had United Produce Company ceased to draw against uncollected funds?

A. No, not in an entirety, at least.

Q. The initial appearing on those sheets, Defendant Exhibit T, this "J," whose initial is that on the right hand of the sheet?

A. That is Mr. Reichwine's as of 10/18.

Q. In other words, when Mr. Reichwine returned from his vacation he was shown this memorandum?

A. Yes.

Q. And initialed it, is that right? A. Yes.

Q. This note says "follow up October 13." Did

(Testimony of Allen R. LeRoy.)

you follow up on that date or thereabouts the situation?

A. As I remember it, we did, and then it was deferred until the 18th.

Q. As indicated by the last memorandum on this sheet, Defendant's Exhibit T, you had a talk with Mr. Rosenthal about the situation on October 14th, didn't you?

A. Frankly, I don't remember, counsel. [599]

Mr. Erskine: I will show you.

Mr. Lasky: I will stipulate that if it says so in that memorandum on the bottom, it is so.

(The paper was handed to the witness.)

A. Yes, sir.

Q. (By Mr. Erskine): Prior to seeing Mr. Rosenthal on October 14th did you make a check to determine whether or not the United Produce Company was still drawing on uncollected funds and whether or not Lofendo and United Produce Company checks were on both sides of the account? Did you make a check to determine those facts?

A. Yes; I kept a running check, as I remember it.

Q. And you found that during that period of time checks on both sides appeared and that United Produce Company had continued to draw on uncollected funds? A. To some extent.

Q. That is, during the period from your first conversation on October 6th, to October 14th, is that right? A. Correct, sir.

Q. And when Rosenthal came into the bank on

(Testimony of Allen R. LeRoy.)

October 14th you told him what appears there substantially in this memorandum, or rather he stated that he would have the situation of drawing on uncollected funds by Monday, October 18th, so that it would not be necessary for them to draw checks against uncollected items, and Mr. Redheffer concurring he was advised that we would [600] continue our present arrangement until that date when it will be automatically terminated. That was the conversation between you, Redheffer and Rosenthal?

A. Yes.

Q. Now, the "present arrangement" to which you referred, is the arrangement carried on by the United of drawing against uncollected funds; that is correct, isn't it? A. Yes, sir.

Q. Did you make an actual investigation to determine how much the float was in this account during that period, October 1, say, to October 9th?

A. I did at the time through one of the clerks, Mr. Eiler, but I do not recall what the figures were at this time.

Q. The expression "float" means the drawing by a customer of checks on a bank account before the collections of funds deposited to his account?

A. In that particular case it was before the arbitrary time in which we estimated collections would be made had elapsed.

Q. But "float" is synonymous in bank practice with uncollected funds, isn't it?

A. Not exactly, no.

Q. What do you mean by "float"?

(Testimony of Allen R. LeRoy.)

A. Float is the amount of checks which have not been deposited against an account. For instance, if you have a thousand dollars that is shown on your books, a thousand dollar balance [601] in the bank, the bank may show \$2,000, representing checks which have not been charged to that account. The thousand dollars is float.

Q. That isn't entirely clear to me.

Mr. Lasky: There are many matters this afternoon that have not been clear to me.

Mr. Erskine: I am just trying to enlighten you, Mr. Lasky. I may not be making a good effort but I am trying.

Q. Do you know whether or not on October 18th the United Produce Company did continue drawing against uncollected funds?

A. That I couldn't say definitely.

Q. On October 18th you turned the account back to Mr. Reichwine? A. Yes, sir.

Q. And from that time on Mr. Reichwine had the duty of supervising the account, is that right?

A. That is correct.

Q. Isn't the way this sort of account is handled in the banks substantially this, is it not: that an account of this sort in which the bank is lending money to a customer is supervised by one of the loaning officers of the bank? A. Correct.

Q. You were such a loaning officer, so was Mr. Reichwine? A. That is right.

Q. And it is the duty of the loaning officer to

(Testimony of Allen R. LeRoy.)

supervise the account, to see that the commitment is being properly used by his customer and to see that the customers is meeting his [602] obligations, with respect to the loan?

A. That is correct.

Q. In other words, it is the duty of the loaning officer, to use the language which you used in Chicago, to police the account?

A. That is correct.

Q. Mr. LeRoy, you have testified, as I have understood you, that you noticed the checks on both sides and you noticed the fact that the company, the United Produce Company, was drawing against uncollected funds, and for those reasons you directed Tague, you had Rudolph direct Tague to go down there and make a special investigation of the books of the company; that is right, isn't it?

A. I have so testified.

Q. Then you got this report that has been introduced in evidence, Tague's report of October 1st, marked Defendant's Exhibit R, that is right, isn't it?

A. I got a report if that is the report.

Q. Yes. And then you had your talks with Rosenthal to which you have just testified?

A. Yes, sir.

Q. Now, I want to find out, Mr. LeRoy, if besides Tague's report of October 1st and your talk with Tague about the report and your talks with Rosenthal which you have related, you did anything else or caused anything to be done to investigate this [603] matter of checks on both sides and this drawing on uncollected funds?

(Testimony of Allen R. LeRoy.)

A. I can't recall anything else.

Q. According to your best recollection that is all you did? A. Yes, sir.

Mr. Erskine: I have reached another subject in my cross-examination, your Honor, shall I proceed or shall I—

The Court: I think you might as well proceed. How much longer do you think you will take with this witness?

Mr. Erskine: I think I will take at least an hour more.

The Court: Very well; proceed.

Q. (By Mr. Erskine): Now, Mr. LeRoy, I call your attention to the memo dated October 11th, which says this:

"A reconciliation of the drafts and accounts of this company showed that we had discounted drafts in the amount of \$122,298, against Alfinito and \$109,233 against Feldbaum, in addition to \$78,000 accounts receivable for both Alfinito and Feldbaum. In view of the fact that we have \$475,000 total accounts receivable of which \$156,000 consists of the Alfinito and Feldbaum accounts, it was felt that concentration in receivables would not affect our position, but Mr. Rosenthal was advised that in the future we would not accept drafts against any one concern in excess of \$10,000."

Mr. Lasky: It says a hundred here. [604]

Q. (By Mr. Erskine): "In excess of \$100,000." Now the expression in this memorandum "accounts

(Testimony of Allen R. LeRoy.)

of this company," the expression which I have just read to you, that means accounts receivable of United Produce Company, assigned to the bank, does it not? A. That is correct.

Q. And this memorandum indicates, does it not, that the drafts discounted by the bank for the two concerns indicated Feldbaum and Alfinito, had been compared with the accounts receivable assigned to the bank as collateral for the loan, and that such comparison showed that the bank had discounted drafts against Alfinito in the sum mentioned \$122,-298 and against Feldbaum in the sum of \$109,233, and that in addition it had taken as collateral assignments of accounts receivable owing by Alfinito and Feldbaum to United in the amount of \$78,000? That is what it showed, did it not? [605]

Mr. Lasky: If your Honor please, I object to inquiry on that particular memo because the memo and the subject matter doesn't seem to have any bearing even upon the defenses or the counter claims; it seems to be straying even from them.

Mr. Erskine: I am coming to that, your Honor, trying to.

The Court: Very well; proceed.

A. Is that what it says on the memo?

Mr. Erskine: Yes.

A. Then I agree.

Q. In other words, a comparison was made between the drafts drawn, or rather drafts discounted by the bank drawn on Alfinito and Feldbaum with

(Testimony of Allen R. LeRoy.)

the amount of accounts receivable assigned by those firms to the bank, is that right?

A. If counsel means did I state that a certain number of Alfinito and Feldbaum accounts receivable were accepted as security and that a certain number of drafts drawn against those firms were discounted, that is what I meant.

Q. I am just asking you if that was what was done, what you had caused done, or what was brought to your notice: that is, that a comparison was made between the drafts discounted by the bank which United Produce Company had drawn on those two firms and the amount of accounts receivable assigned by the United Produce Company of those two firms to the bank as collateral.

A. You can call it a comparison if you wish; the amounts were [606] given there.

Q. The point to which I am coming, Mr. LeRoy, or the point which I am trying to bring out is that from time to time, according to the practice of the bank, an investigation was made of the drafts discounted and the amount of accounts receivable assigned for the purpose of determining the amount of the drafts of any one customer of the United being discounted by the bank for the United Produce Company and the amount of accounts receivable of any one customer of the United Produce Company being assigned to the bank; that is correct, isn't it?

A. That wasn't the purpose of it. The purpose of it—there was a limitation placed on the amount

(Testimony of Allen R. LeRoy.)
of the drafts for any one firm, Feldbaum or Alfinito,
that we would accept.

Q. In other words, that limitation in the case of
Alfinito and Feldbaum was \$100,000?

A. As I remember it, yes, sir.

Q. And you did that to avoid what is known in
the banking language as a concentration in drafts
of those firms; that is right, isn't it?

A. Is that correct.

Q. And the same investigation was made of
accounts receivable?

A. No, sir; there was no effort made to make—
effect a comparison between the two, although
naturally the total liability was gotten at the same
time.

Q. The memorandum of October 11th does refer
to the fact that [607] there had been assigned to the
bank accounts receivable of Alfinito and Feldbaum
aggregating \$156,000; that is right, isn't it?

A. Yes, if that is what it says in amount.

Q. And that check evidently was made at that
time, is that correct? A. Yes, sir.

Q. After you had discovered or after it had been
reported to you that the bank was discounting drafts
of the United drawn on these two firms in the
amounts mentioned in this memorandum, and after
you had discovered that these two firms, or rather
that United had assigned accounts of these two
firms to the bank as collateral, you called in Mr.
Rosenthal to discuss those concentrations with him,
did you not?

(Testimony of Allen R. LeRoy.)

A. I don't know whether I called him in or talked to him on the telephone.

Q. But at any rate you talked to him about it, did you? A. Yes, sir.

Q. And you told Mr. Rosenthal that your branch would not discount drafts for either one of these concerns, Alfinito or Feldbaum, in excess of \$100,000, is that right?

A. You mean drafts against those concerns?

Q. Yes, drafts against those concerns.

A. Yes, sir.

Q. And you told him that he should get his commitments on [608] such drafts down to that figure of one hundred thousand dollars?

A. That is correct.

Q. And you knew at that time that the bank had notified the United Produce Company to the same effect; that is, that it would not discount the drafts on either one of these concerns in excess of \$100,000?

A. Yes, sir; they had been notified several times prior to that.

Q. So it was the task of some officer or employee of the bank to check up from time to time to determine the concentration in these drafts being discounted by the bank for the United Produce Company?

A. We didn't have to check up; it showed up on the daily liability register.

Q. While you were in charge of this loan, you knew, did you not, Mr. LeRoy, that the United

(Testimony of Allen R. LeRoy.)

Produce Company was executing to the bank assignments of accounts receivable as collateral for new loans which were being made from time to time by the bank to it?

A. Certainly because that was—they were according to the general assignment agreement, they were supposed to assign all of their receivables.

Q. And those assignments were made from time to time, what we call the interim assignments during each month, were they not?

A. That is correct. [609]

Q. And then at the end of each month a so-called trial balance monthly assignment was made under which the United Produce Company assigned to the bank all the accounts receivable of the company then in existence?

A. As indicated by balances, that is correct.

Q. That is right. And specifying the accounts receivable, listing them?

A. That is correct, by balances.

Mr. Lasky: We are covering all this by stipulation, aren't we?

Mr. Erskine: The question is preliminary. I want to find out something from the witness with respect to these assignments.

Q. While you were in charge of this account you from time to time examined the interim assignments and also the monthly trial balance assignments, did you not?

A. I saw one monthly trial balance assignment during that time, yes, sir, and I assume that I saw

(Testimony of Allen R. LeRoy.)

an assignment, interim assignment, practically every week day.

Q. It was part of your duty as the loaning officer in charge of this loan to do that, was it not, Mr. LeRoy? A. If I passed on the loan.

Q. Yes. A. The interim loan. [610]

Q. You say you did see one of what we have called the trial balance monthly assignments executed by the United to the bank; that is correct, is it?

A. Yes, sir. I should have seen it. I do not recollect anything about it in particular. It might have been that one or another of the owning officers handled it at the end of the month.

Mr. Erskine: I would like to have the monthly trial balance assignment that was executed by the United Produce Company to the bank towards the end of September, 1948. Will you produce that, Mr. Lasky?

Mr. Lasky: I have it here, but I submit—I won't offer it in the form of an objection but I submit this is too remote. We are getting back a month and a half prior to any controversy in this case. This is October 2nd, and there must be 45, 50 or 60 of these that intervened.

The Court: Intervened?

Mr. Lasky: Yes.

Mr. Erskine: The purpose, your Honor, is this, according to my information: This statement would show, however—I may be incorrect in this and I'll have to check it up—this statement will show

(Testimony of Allen R. LeRoy.)

that at the end of the month of September or the first part of October, at the very time that this investigation was being made by Tague, a monthly trial balance assignment was executed by the United Produce Company to the bank, and that that monthly trial balance showed that at the end of October [611] 1948—

Mr. Lasky: September?

Mr. Erskine: No, at the beginning of October, October 2nd 1948, Lofendo had signed accounts receivable to the bank aggregating—I do not know exactly how much—my figures here, my notes show aggregating \$43,305. That may be wrong. That is subject to check. That was during the month of September, 1948, the bank had received the checks of Lofendo on account of the accounts receivable aggregating \$341,350.30, or 44 per cent of the total payments were received during that month, and I want to find out from this witness whether or not he knew those facts and whether or not Mr. Tague, mentioned his special audit the report of which was dated October 1, and referred his contention to that fact.

Mr. Lasky: I submit to the Court it is immaterial because it is too remote.

The Court: It occurs to me that it is remote, counsel. The method of handling the account and the investigation of it occurred about this time, so anything that went on at least prior to the investigation does not make any difference here, does it, under your feeling?

(Testimony of Allen R. LeRoy.)

Mr. Erskine: Oh yes it does, your Honor. In other words if the trial monthly assignments showed that there were in existence assignments from Lofendo as of October 2nd, 1948, of something like \$43,000, at that during the month of September the [612] bank took checks of Lofendo on account of accounts receivable aggregating the tremendous total of \$344,000, I believe that if those facts developed that they show that something was radically wrong in the operation of this bank, and they ought to have realized on October 1st, when the investigation was made, that that tremendous concentration of payments of \$344,000 from one debtor, when the figure showed that debtor had only assigned a moderate amount of accounts receivable—that that tremendous concentration of payments should have shown them that something crooked was going on, and that when they sent their wire of October 20th to the Bank of America, referring the Bank of America to their letter of September 22nd, that said everything was rosy, there was something radically wrong with the operation of the bank.

The Court: So far as that is concerned, whether it is material or not, you can agree upon the facts.

Mr. Lasky: We certainly should be able to stipulate to anything shown by papers like this.

The Court: For the last hour and half I have heard little that I can think of that has not been stipulated to. It seems to me that as surely as what those records show in September if they are material, they can be stipulated to.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: If we can stipulate to the facts—

The Court: You are not getting them to stipulate to the facts that they were negligent. [613]

Mr. Erskine: We can probably stipulate to the fact that during the month of September the Merchandise Bank refused Lofendo's checks on account of the accounts receivable aggregating \$344,000. Now, I want to find out if this witness knew about that, and if that is a preliminary question.

The Court: If you make your stipulation and then all you have to do is ask him if he knows, and that ends it. I have not quite followed you through, counsel, but you attach importance to it, and I will listen to your arguments later in your memorandum and so forth. I am going to permit you to go ahead, but I wanted to do it—

Mr. Erskine: I want to expedite it, your Honor, as much as I possibly can, but your Honor, I am sure, appreciated my position in this litigation. I have spent an enormous amount of time and effort it, and so have my associates. I firmly believe that we are 100 per cent right. The facts we are going to show are simply astonishing.

The Court: Of course, but as to what the facts are with respect to these matters and, as I say, most of the things that you have inquired about in the last hour and a half could have been stipulated to so far as facts are concerned—as to what you argue comes from the facts is a different matter.

Mr. Erskine: Perhaps that is so, the court please, and I certainly want to defer to the Court. But I

(Testimony of Allen R. LeRoy.)

do not think we could get a stipulation from the other side that that report of [614] October 1st was a report that on its face was extremely unsatisfactory, and that is what I was attempting to show. I want to find out this witness whether he knew about Lofendo's concentration of payments from Lofendo.

The Court: This witness did not say the report on its face was extremely unsatisfactory. Those are things you are going to ask the Court to draw conclusions from.

Mr. Erskine: Yes, but I tried to get the facts from a report that indicates that the report must have been unsatisfactory. That is the purpose of my examination, and I believe that to be so, and the witness himself, according to my understanding of it, practically said that.

The Court: He said he was satisfied with it. That was his position and I can't understand why a stipulation could not have been secured. But go ahead and proceed.

Mr. Erskine: I do not want to be placed in this position, your Honor. I do not want to be placed in the position where I feel that I am irritating the court. That is not a position any lawyer wants to get into, and I do not want to get into that position but at the same time I feel I must try my case according to my likes.

The Court: Don't worry about that at all, because you are not going to be in that position. The thing that I keep wanting you to do is to make the effort in the first place to make the stipulation. If

(Testimony of Allen R. LeRoy.)

you cannot do it, that is very fine [615] with me. We will sit here from now until next Christmas to get all the evidence if you can't make the stipulation, proceed.

Mr. Erskine: I will try to come to it more rapidly this way.

Q. Did you know, Mr. LeRoy, that during the month of September checks of Lofendo drawn to the order of United Produce Company were received with the remittances on account of accounts receivable assigned to the bank? Was that fact called to your attention—checks in the sum of over \$300,000?

A. No, I did not attach any importance to it. I knew that some large amounts were received. But counsel, I might suggest the fact that there was only \$46,000 shown on the 7th of the month, which was the time of the new trial balance, and the fact that \$376,000 in checks had been received during the entire month of September does not represent anything he says the representation was made, according to that report, that it was a great season. Accounts were turning over very rapidly and those accounts only were outstanding a very short number of days. And so consequently there could have been \$46,000 at the beginning of the month and still there could have been \$376,000 and some paid during the month.

Q. Now, Mr. LeRoy let me see if I understand you: During the month of September the records show—I will ask counsel to stipulate—that the bank

(Testimony of Allen R. LeRoy.)

received from debtor's owing accounts receivable \$777,629.89. [616]

Mr. Lasky: You take up the stipulation with me outside the courtroom where I can see the figures. I can't pick them out of the air.

Q. (By Mr. Erskine): I'm just asking your opinion as a banker. Assuming that the total checks received by the bank from debtor's owing accounts receivable was that figure of \$777,629.89, and assuming also that of that total \$341,350.30 were in Lofendo's checks—in other words, approximately 44 per cent of the total—in your opinion as a banker did that reflect a healthy situation?

A. Not a healthy situation. Concentrations are never healthy.

Q. That is an extreme concentration, isn't it?

A. Not extreme perhaps but it is a concentration and it is not healthy, but it is entirely possible to have it and have it be a perfectly valid transaction.

Q. In the case of the drafts of Felbaum, drafts drawn by United on Felbaum and discount is by the bank in excess of \$100,000, that was regarded as an unhealthy concentration, is that not so?

A. At any one time, yes.

Q. Do you testify that assuming hypothetically that the payments received, that checks of Lofendo on account of the accounts receivable aggregating \$341,000 were received during the month of September, constituted forty-four per cent of the total payments of that sort received, do you testify that

(Testimony of Allen R. LeRoy.)

that [617] was a healthy or unhealthy concentration in payments?

Mr. Lasky: If the Court please, what difference does it make with respect to the Bank of America whether in the month of September or October our bank's loaning operations with United Produce Company, our loaning technique was healthy or unhealthy? It gets back to the immateriality of these defenses. Sometime I want to present my argument on it. It seems to me so obvious. It has nothing to do with the case.

Mr. Erskine: It has a great deal to do with it, your Honor.

The Court: Counsel has a theory with reference to the matter.

Mr. Lasky: We could get into another lawsuit here, with all sorts of evidence as to whether we were a good bank or a bad bank, and the way we conducted loans. I would like to avoid getting into that kind of trial.

Mr. Erskine: I think you were a very bad bank in the way you conducted these loans, and I want to show it, and I want to show that when you wired the Bank of America on October 20th that United Produce Company was a sound account, and when you referred to that letter of September 22nd, which represented the United Produce Company was a very good account, that you did it without any justification or basis whatever, and I am going to show that.

(Testimony of Allen R. LeRoy.)

The Court: Then you will show that you acted in reliance upon that. [618]

Mr. Erskine: That is what we have already shown.

Mr. Lasky: The evidence shows they did not have reliance on it. If anything is clear, that is clear in this case.

Mr. Erskine: According to your contention that is clear, but according to my contention it is absolutely clear we did rely on it.

Mr. Lasky: Of course, the two contentions cannot be equally valid. I will submit that on its face on the record.

The Court: Proceed, counsel.

(The last question was read.)

A. It was an unhealthy concentration, I will admit, but entirely valid. It might have represented a series of entirely valid transactions. That is a question of credit department.

Q. (By Mr. Erskine): Was it reported to you by Mr. Tague and do you know about the concentration?

A. Mr. Tague was not asked in that report to give any information with respect to the accounts receivable. That came on a separate report.

Q. Wasn't Mr. Tague asked to make an investigation to determine the circumstances giving rise to the checks drawn by the United Produce Company to the order of Lofendo and checks of Lofendo drawn to the order of United Produce Company on

(Testimony of Allen R. LeRoy.)

both sides of this account? He was asked to investigate that, wasn't he?

A. Yes, but not both sides of the accounts receivable; they are two different parts. [619]

Q. And if Mr. Tague in investigating that situation had found out that the United Produce Company had this account with the checks on both sides and at the same time was receiving checks from Lofendo on account of accounts receivable aggregating about thirty-four per cent of the total of payments received during September, if he had found that out, you think that that should have alerted him to something wrong in this account?

Mr. Lasky: This call for this witness' conclusion as to whether he thinks somebody should have alerted somebody else.

Mr. Erskine: He is a banker.

The Court: Objection sustained.

Mr. Erskine: Now, it is half past five, your Honor. I have about come to another point.

The Court: Let us look at our situation again.

(Thereupon a discussion among the Court and counsel of respective parties ensued as to the profitable future lengths of the trial, after which an adjournment was set until tomorrow, Friday, June 23, 1950, at 10:00 a.m.) [620]

Friday, June 23, 1950, at 10 A.M.

The Clerk: Merchandise National Bank v. Bank of America on trial.

Mr. Lasky: If your Honor please, your Honor will recall that on Monday last I stated that we intended to make a motion to strike the answer of Mouradick to the third party complaint or, rather, to the interpleader counter-claim. I requested Mr. Erskine to notify Mr. Bianco to that effect. I understand Mr. Bianco has no intention of coming to Court.

Mr. Erskine: I telephoned to him yesterday, your Honor, and he said he did not feel able to come up here.

Mr. Lasky: Then since he is in legal contemplation in Court, since he was here at the opening of the trial, at this time on behalf of the plaintiff we move to strike out the pleading of Mr. Mouradick on the grounds that Mr. Mouradick has never served and never did serve any copy of that pleading upon the plaintiff, and therefore is not actually a party to this proceeding and therefore it should be stricken from the record.

Mr. Brandley: Your Honor, I would like to join in that motion on behalf of the trustee in bankruptcy of the United Produce Company, another interpleader defendant. I would like to say the record shows Mr. Mouradick was served with process on October 19, 1949, the summons giving him twenty days to [621] answer. His first appearance for pleading in the case was filed almost seven months later, on the 12th of May, 1950, and the records shows no stipulations for extensions of time to plead in the meantime. That pleading was never served on me, representing the trustee in bank-

ruptcy, and I do not believe it was served on Mr. Lasky.

Mr. Lasky: No, it never was. I never knew of Mr. Mouradick or his counsel until we came into Court.

Mr. Bradley: So we did not know of his pleading or who represented him until the eve of the trial. So far as the claim of the trustee in bankruptcy is concerned under the interpleader, the essential facts supporting that claim are admitted. They are alleged in the interpleader counter-claim and they are admitted by the replies thereto, both of the trustee and Merchandise National Bank. There would be no issue in this case as to those facts, except insofar as the reply of Mouradick denies them. Now, if the reply of Mouradick is allowed to stand, it will force the trustee to the trouble and expense at this late date of bringing witnesses and attempting to produce evidence to support their claims, which is admitted by all of the other parties. For that reason we would also join in the motion that this pleading be stricken.

The Court: Mr. Bianco represents—

Mr. Lasky: Mouradick, one of the interpleaders party defendants. [622]

The Court: Mr. Bianco is counsel for Mouradick.

Mr. Lasky: He has so appeared here, although his name has come into the record as counsel for the Bank of America at an earlier stage.

Mr. Erskine: Mr. Lasky has referred to that circumstance. There is nothing inconsistent in the fact

that Mr. Bianco represented the Bank of America in one situation and represents Mouradick in another, and levies a garnishment upon the Bank of America. I have represented the Bank of America for some time, and if I bring a suit against an individual and want to garnish the bank, I do not hesitate to do so.

The Court: Mr. Bianco has indicated to you he does not intend to appear?

Mr. Erskine: That is right, your Honor.

The Court: The motion is granted.

Mr. Bradley: Your Honor, in that case may I ask one more question? At some appropriate stage in the proceedings I would like to make a brief statement of the position of the trustee of bankruptcy in this action and ask permission to file a memorandum of law. I would assume the appropriate time to do that would be after all the closing arguments between the plaintiff and the defendant, if that is the way your Honor would like to have it.

The Court: Does counsel want to argue the matter orally or just submit it on your briefs at the conclusion of the [623] evidence?

Mr. Lasky: I, of course, will naturally defer to what the Court wishes. I think it might be very useful if we did have some oral argument shortly after the case is closed, while the evidence is fresh, and then the briefs can deal more with the law than with the facts. I think it would be helpful.

The Court: We will work that out as soon as we have time to do that.

Mr. Lasky: I will do whatever the Court thinks is most convenient.

The Court: We will work that out.

Mr. Bradley: Will it be proper to defer my statement on behalf of the trustee in bankruptcy until the arguments of other counsel have been concluded? My statement will be very brief, I might say.

The Court: I do not know that it is necessary to your position in the case. You are not in a position to argue the facts as they have been developed here.

Mr. Bradley: No, your Honor; that is correct. There is no issue of fact so far as we are concerned.

The Court: Your position depends upon what the decision is as between these two.

Mr. Bradley: That is true, but there may be an issue between Merchandise Bank and the trustee in case the judgment is granted for the Bank of America in the main case. Ordinarily, [624] of course, the Court would have to determine the issues between the two banks before the trustee would be required to put on his case.

The Court: Very well. You may make a statement at that time.

Mr. Lasky: Before counsel leaves, I understand that counsel for the trustee is prepared to stipulate to those summaries of the evidence of Mr. Gassman and Lofendo which I have prepared. He will accept them as the evidence of those witnesses. Correct, counsel?

Mr. Bradley: I have not seen the final preparation of that statement.

(After conferring with other counsel.)

Mr. Bradley: That is correct.

Mr. Lasky: It is final to the extent that I have not yet heard from Mr. Erskine on it. When I have heard from him it may have to be altered.

Mr. Erskine: I do not think so. I have not had a chance to fully study it.

Mr. Bradley: If it is altered, we will have another opportunity to check it.

The Court: Very well. Mr. LeRoy is on the stand.

ALLEN R. LeROY

recalled for defendant under Rule 43(b), previously sworn. [625]

Direct Examination

(Continued)

By Mr. Erskine:

Q. I have not very many questions, Mr. LeRoy, in addition to what I asked you yesterday. This may have been covered. I would like to ask you this. It is not unusual for a bank to pay checks of a depositor against uncollected funds in the depositor's account, is it?

A. Did you say was it usual or unusual?

Q. It is not unusual.

A. No, it is not unusual. It has been done in many cases.

Q. It was done in the case of the United Produce Company for some time prior to October 1st, by your bank, wasn't it?

A. Yes, I would say for some time, meaning, at

(Testimony of Allen R. LeRoy.)

least, thirty, forty days perhaps. I wouldn't want to go back of that.

Q. Therefore the thing that called your attention to the account was not only the fact that the United Produce Company was drawing against uncollected funds but also the fact that the checks were on both sides; that is right, isn't it?

A. Also the fact that they were depositing any checks in their commercial account, in view of the fact that we had the general assignment covering all of their accounts receivable.

Mr. Erskine: Will you read that last answer?

(Answer read by the reporter.)

Mr. Erskine: I do not quite understand that: the fact that they were depositing checks in their commercial account?

A. Well, we had a general assignment covering all of the accounts [626] receivable.

Q. Yes, that is right.

A. Consequently on large amounts it was a puzzle as to where they would derive funds outside of their accounts receivable or goods shipped on drafting operations.

Q. They could not get funds except from those two sources, could they, so far as the bank knew?

A. That is what I wanted to determine, where they were getting them. If they had gotten them from the accounts receivable, they should have gone into a remittance to pay the—remittance on the accounts receivable. If a draft were paid, it wouldn't, of course, come to the collection department of the bank.

(Testimony of Allen R. LeRoy.)

Q. What did you find out in that regard?

A. As Mr. Tague's memorandum shows, we found out that it was allegedly in payment of the pre-season advances.

Q. I see. Those funds were not coming to the bank as either payments on account of accounts receivable or on account of drafts, is that right?

A. That is right, sir. [627]

Q. As I understood you, you say that amounts mentioned in Tague's report were not coming in to the bank either under the general assignment of accounts receivable or on account of drafts discounted; that is right, isn't it?

A. That is correct.

Q. Did you discuss that circumstance with Mr. Rosenthal?

A. After Mr. Tague's report, yes, sir.

Q. What did you say to Mr. Rosenthal on that score?

A. Mr. Tague's report appeared to cover it, and I didn't bear down on that particular point. The point that the discussion was on, was that regardless of how the checks came, we wanted no disbursement on them prior to collections or adequate time at least to collect the checks.

Q. Then as I understand you, in your discussion with Mr. Rosenthal, you did not, to use your expression, bear down upon the fact that Tague's report showed that the United Produce Company was receiving sums that were not covered by the

(Testimony of Allen R. LeRoy.)

assignment of its accounts receivable or its drafts discounted, but what you did discuss with Mr. Rosenthal was the fact that you didn't want him to draw any longer on uncollected funds?

A. That was the point largely, because we accepted Mr. Tague's report.

Q. Tell me this, Mr. LeRoy, is Mr. Tague still working for your bank?

Mr. Lasky: Just a moment, please. I object to that as [628] utterly immaterial. Whether Mr. Tague is with us or not with us.

The Court: What is the materiality?

Mr. Erskine: I believe I can show that shortly after Mr. Tague gave his deposition in this matter he was discharged.

Mr. Lasky: If that was a fact, it would be irrelevant.

The Court: What bearing does that have upon the matter, counsel?

Mr. Erskine: Well, it shows that the bank, it seems to me, thought that he was negligent in the performance of his duties.

The Court: Oh, no, no, no. The objections is sustained.

Q. (By Mr. Erskine): I will put the same question to you about Mr. Reichwine, Mr. LeRoy.

Mr. Lasky: Same objection.

Mr. Erskine: Pardon me; let me get the question in.

Q. Is Mr. Reichwine still working for the bank?

The Court: For the same purpose?

(Testimony of Allen R. LeRoy.)

Mr. Erskine: The same purpose.

The Court: The objection is sustained.

Q. (By Mr. Erskine): And Mr. Redheffer?

Mr. Lasky: Same objection.

The Court: The objection is sustained.

Q. (By Mr. Erskine): I am quite sure that I asked you this, but it will only take one question to clear up the point, I [629] believe, and that is this: you didn't learn anything about the rejection by the Merchandise Bank of the \$97,000 in checks until the afternoon of November 19, is that right?

A. That is correct.

Q. When you were told by Mr. Messenger?

A. Correct.

Q. When you came out here to California you had a list of the Lofendo checks which had been received by the Merchandise Bank the location of which you wanted to determine; that is correct, is it not?

A. Yes, sir, Lofendo and other checks, too—other items.

Q. Mainly Lofendo checks though, were they not? A. Yes, sir.

Q. And Lofendo checks in excess of \$500,000?

A. As I remember it the whole items were in excess of \$500,000, yes, sir.

Q. The bulk of it was Lofendo checks?

A. I would say so.

Q. And as I understood your testimony the other day, you weren't sure how your bank had come

(Testimony of Allen R. LeRoy.)

into possession of those checks, whether they had been deposited by the United Produce to the credit of its commerical account, or whether they had been received from United Produce with remittance sheets as payments on account of assigned accounts receivable?

Mr. Lasky: That question relates to what he knew at the [630] time he came to San Francisco?

Mr. Erskine: That is right.

A. At that time I didn't know where the items originated, what the source was with us.

Q. (By Mr. Erskine): Did you know at that time whether or not the United Produce Company had ceased to draw against uncollected funds with your bank?

A. I knew that they had ceased on the 17th.

Q. Did you know whether after they had ceased on the 17th they continued to draw against uncollected funds until the 17th of November?

A. Well, counsel, I said they ceased on the 17th because they ceased operations—the 17th of November, because they ceased operations on that day.

Q. I see. I thought you referred to the 17th or 18th of October; pardon me. Do you know whether after October 18th the United Produce Company ceased to draw against uncollected funds?

A. My impression is that it did not in entirety.

Q. But to a large extent?

A. Until about the 1st of November.

Q. And then about the 1st of November they

(Testimony of Allen R. LeRoy.)

ceased to draw against uncollected funds, is that right?

A. That is my impression. I wouldn't want to state that without looking it up.

Q. Did you know that when you came out here to California? [631]

A. Know what? The day it ceased to draw—

Q. Yes.

A. —or had not ceased to draw against uncollected funds?

Q. That's right.

A. That they had not ceased to draw?

Q. Did you know whether or not they had ceased to draw against uncollected funds?

A. I was advised that they had ceased to draw, but I didn't look it up myself.

Q. If you knew that, Mr. LeRoy, if you were told that, didn't you also know, or didn't you believe that the time that you came out to California that the checks, the Lofendo checks, the whereabouts of which you wanted to determine, had been delivered to the bank on account of accounts receivable?

A. I didn't try to make any construction of the source of them at that time.

Mr. Erskine: I see. I think that is all, your Honor.

Mr. Lasky: No questions.

The Court: Very well. You may step down.

Mr. Erskine: I will call Mr. Johnson.

KENNETH M. JOHNSON

called on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court.

A. Kenneth M. Johnson. [632]

Direct Examination

By Mr. Erskine:

Q. Mr. Johnson, what is your occupation?

A. I am an attorney on the legal staff of the Bank of America.

Q. Have you got a title?

A. I have the title of assistant counsel.

Q. Assistant counsel. Does that make you an officer of the bank? A. No.

Q. How long have you occupied that position, Mr. Johnson. A. Approximately—

Mr. Lasky: Just a moment, please. I think that the last question called for the witness' conclusion.

The Court: Yes, it did.

Mr. Lasky: I move to strike out the answer for that reason and object to the question.

The Court: Very well, the answer may be stricken. The objection is sustained to the question as to whether or not his work makes him an officer of the bank.

Q. (By Mr. Erskine): How long have you been an assistant counsel for the Bank of America?

A. Approximately 10 years.

Q. Approximately 10. How long have you been practicing law, Mr. Johnson?

(Testimony of Kenneth M. Johnson.)

A. Approximately 24 years.

Q. Do you recall having a conversation with Mr. Roland Duncan and Mr. LeRoy who was just on the witness stand and yourself [633] on November 18th? A. Yes, I do.

Q. Where did that conversation take place?

A. That took place in my office at 300 Montgomery Street.

Q. Before I come to that, Mr. Johnson, in view of the representation that I made to the Court the other day, you have not been well recently, have you?

A. No, I have not. As a matter of fact, this is the first day that I have left my home after being in the hospital.

Q. You have been sick about a month, is that right? A. That is correct.

Q. Getting back to this conversation, did you say that it took place in your office in the Bank of America? A. That is correct.

Q. And about what time on November 18th?

A. In the afternoon.

Q. About what time in the afternoon? Can you fix the time approximately?

A. I would say approximately 2:30.

Q. Tell us what was said in that conversation, Mr. Johnson, between you, Mr. Duncan and Mr. LeRoy.

A. Well, the conversation can be broken down into two different sections. During the—

(Testimony of Kenneth M. Johnson.)

Q. I take it that first of all, Mr. Duncan introduced Mr. LeRoy to you, did he? [634]

A. That is correct.

Q. What did he say?

A. Mr. LeRoy had already had some conversation with Mr. Duncan, and Mr. Duncan came in and he introduced Mr. LeRoy to me, indicating the bank he was connected with, and stated that he had certain problems, or that certain problems had arisen.

The first portion of the conversation dealt with whether or not it was necessary to go through with formal presentation and protest with relation to certain checks. I think the conclusion was reached, probably suggested by myself, that the holder of those checks could waive both presentation and protest. That took a minute or two to discuss. We passed on to the subject matter principally of our conversation.

Q. Now would you pause there for a minute, Mr. Johnson, so that we get that clear. There was a discussion with respect to the waiver of presentation and protest of certain checks, was there?

A. That is correct.

Q. Was it explained to you what checks that discussion referred to in a general way?

A. Well, very probably in a very, very general way. My recollection now is that I knew that the Merchandise Bank and the Bank of America were concerned. It came to me as more or less an academic problem at that time. It was only discussed

(Testimony of Kenneth M. Johnson.)

for a moment or two. I have no detailed recollection as to it.

Q. You gave your opinion on that point, did you? [635] A. That is correct.

Q. And I think you have stated that what you told them was your opinion, is that right?

A. That is correct.

Q. Then the discussion went on to another subject. Tell us what the matters discussed were.

A. Well, between Mr. LeRoy and Mr. Duncan, they familiarized me with a situation about as follows: They stated that approximately \$113,000 worth of checks had been presented originally at the East Bakersfield branch of the Bank of America; that these checks—

Q. Had been presented or deposited there?

A. Well, they used the word "presented"; they came from the holder; they were delivered there. And sent by the East Bakersfield branch of the Bank of America to the Merchandise National Bank of Chicago, which was the drawee bank.

Mr. LeRoy, possibly amplified in some detail again by Mr. Duncan, told me that those checks had not been paid; that regardless of that that a clerk had picked up an advice of credit in error and that advice had been mailed to the Bank of America.

To summarize the conversation, one of the principle purposes of Mr. LeRoy's visit—

Q. (By Mr. Erskine): Is this what he said? Is this what Mr. LeRoy said? [636]

(Testimony of Kenneth M. Johnson.)

A. No, this isn't what Mr. LeRoy said; I am still summarizing the conversation.

Mr. Lasky: Well, if it is the witness' conclusions about it, I would object to it.

The Court: Yes. Don't summarize it; just recite the conversation.

A. Well, after stating the facts, that I have already indicated Mr. LeRoy made a request that the Bank of America disregard the advice of credit when it should be received by the bank. There followed then a discussion between Mr. LeRoy and myself of the various legal aspects of the situation. Mr. LeRoy took the position that he, having arrived—

Q. (By Mr. Erskine): Is this what he said?

A. What he said. Then he having arrived in person prior to receipt of the credit, that the Bank of America was bound to obey his request that the Bank of America disregard the advice of credit. At that time I was concerned with the—

Mr. Lasky: Now I am going—

The Witness: No.

Mr. Lasky: I am going to object to what he was concerned with.

Q. (By Mr. Erskine): Is this what you told him?

A. Yes; I pointed out to Mr. LeRoy that his institution was not the only one concerned; that the depositor at East Bakersfield who had delivered these checks to the bank had [637] certain rights in the premises. [638]

(Testimony of Kenneth M. Johnson.)

Q. Go ahead. What else, what was said in that connection, in this discussion of the legal positions of the parties?

A. I did tell Mr. LeRoy and also Mr. Duncan that without making an effort to determine the ultimate legal rights and duties, that we were anxious to assist Mr. LeRoy and the Merchandise National Bank in any way which would not cause injury or loss to the Bank of America, and that I would do everything that I possibly could to that end.

Immediately after that I placed a call for Mr. Etribou of the East Bakersfield Branch. I outlined to Mr. Etribou very roughly and briefly the information made known to me by Mr. LeRoy, I asked Mr. Etribou what was the situation in relation to the Lofendo account. Mr. Etribou, I should say, as Manager of the East Bakersfield Branch of the Bank of America, told me that there was a credit balance in the Lofendo account and that he had not advanced specifically to Mr. Lofendo against the \$113,000 worth of checks that was the subject of conversation.

On the basis of the information that I had at that time received from Mr. LeRoy—

Mr. Lasky: Just a moment. It is obvious the witness is starting off on something that he did not say. He said the basis of something.

Q. (By Mr. Erskine): Is this what you told Etribou? A. Yes.

Q. Go ahead. [639]

(Testimony of Kenneth M. Johnson.)

A. I told Mr. Etribou that on the basis of the information which I had received from Mr. LeRoy and also on the basis of the information that Mr. Etribou had given me, that he should ignore the advice of credit when he received it

Q. What did Mr. Etribou say to that?

A. Mr. Etribou remonstrated with me over the telephone. He appeared reluctant—

Q. Did he say—

A. He was reluctant.

Mr. Lasky: I move to strike out the statement that he was reluctant and that he remonstrated.

The Court: Yes. Do not characterize what he said; just tell us what he said.

Q. (By Mr. Erskine): That is right. Just tell us what he said, Mr. Johnson.

A. Mr. Etribou told me that he doubted that he would be permitted to ignore the advice of credit when it arrived. Further, that if he was to ignore it, he would desire a letter in writing from some official of the Bank of America at San Francisco. I told him again orally to ignore the advice of credit when it arrived. I told him also that I would have a letter sent to him as he had requested to the same effect.

Q. Was there anything said as to how long he should continue to ignore the advice of the credit?

Mr. Lasky: Now, that is a leading question and a suggestive [640] question to his own witness.

The Court: Yes. It is a peculiar question: How long to ignore a matter. Do you mean you could

(Testimony of Kenneth M. Johnson.)

ignore it and then not ignore? Is that the theory?

Mr. Erskine: I do not want to state the theory because that would be suggestive, your Honor.

The Court: The question is leading. He is your witness. The objection is sustained.

Q. (By Mr. Erskine): Can you tell us anything else that was said in that conversation between Etribou and yourself, Mr. Johnson?

A. Well, the conversation was relatively brief. I told him to ignore the advice of credit. I also told him to freeze the account and not permit any transactions of any kind or charges on the part of anybody. Mr. Etribou again requested written confirmation. I feel quite certain that I warned him again that there should be no further transactions, and that terminated the conversation.

Q. When you and Mr. LeRoy were discussing the legal aspects of the situation, was there anything said in addition to what you have already said with respect to the position of Lofendo in the matter?

A. Pardon me. You say Lofendo was the name?

Q. Yes. Lofendo was the depositor.

A. As I have already stated, I have indicated to Mr. LeRoy I [641] had concern for possible claims by our depositor. Mr. LeRoy was quite definite in his statements to me that we need have no fear in that connection, that Lofendo was a participant in a fraud.

Q. Have you related about all that was said in that conversation between you, Mr. Duncan and Mr.

(Testimony of Kenneth M. Johnson.)

LeRoy now, Mr. Johnson?

A. I think that is just about all. I think the statements that I have indicated on behalf of the participants and their conversation fairly indicate its nature and substance.

Q. That is all right. You have stated all that you could recall. After that took place, what happened? Did Duncan and LeRoy leave?

A. I requested Mr. Duncan, who was an officer of the bank, to write a letter to Mr. Etribou, Manager of the East Bakersfield Branch, requesting or, directing him to ignore this credit when it should arrive. At that point Mr. Duncan and Mr. LeRoy left my office together.

Q. Did you see them later in the afternoon?

A. I did.

Q. Shortly thereafter?

A. Well, I would say it was at least an hour, possibly longer. It would be in the later part of the afternoon.

Q. Were they together when they came into the office?

A. They were together. At that time they brought with them a letter which had presumably been prepared by Mr. Duncan and [642] directed to Mr. Etribou. That letter was exhibited to me. I was asked if I approved its transmission. I said that I did. My recollection of it is that there was a second memorandum dealing with other matters, that either Mr. Duncan or Mr. LeRoy had prepared,

(Testimony of Kenneth M. Johnson.)

which was exhibited to me at that time, but with which I was not directly concerned.

Q. The second letter you have mentioned, I take it, Mr. Johnson?

A. Yes, this is the second letter which I mentioned.

Q. And the other letter to Etribou was this, was it, Mr. Johnson, as you recall Plaintiff's Exhibit 11, dated November 18th, 1948?

A. That is the first letter to which I have just referred.

Q. Mr. Johnson, did you or did you not in that conversation with Mr. LeRoy say anything to the effect that you believed that Merchandise National Bank was within its rights in revoking the advice of credit?

Mr. Lasky: If the Court please, your Honor, that is a leading question. The witness has been asked to relate the conversation and have related it.

The Court: Oh, yes, but I do not think we have to worry about that.

Mr. Erskine: I think I have a right to rebut the testimony of Mr. LeRoy by direct questions of that sort.

The Court: Yes, proceed. The objection is overruled. [643]

A. I think that I did say that it might well be that Mr. LeRoy was correct in his contentions. However, I was not trying to act as a judge at that time.

(Testimony of Kenneth M. Johnson.)

Mr. Erskine: I think you stated previously that you told him that you were not going to make a final decision with respect to the legal rights of the parties?

Mr. Lasky: That certainly is a leading question.

The Court: Yes, surely. The objection is sustained.

Q. (By Mr. Erskine): Did you tell Mr. LeRoy that in your opinion if the Bank of America entered this credit, it would do so at its own risk?

A. I think that is in substance similar to the question I just answered: Mr. LeRoy told me that, and I believe I said it might well be true. However, I did tell him that regardless of what the ultimate legal rights were, to the extent that the Bank of America was not injured and would not suffer, and regardless of the legal rights, the technical legal rights of the parties, we would do everything that we could to assist him and his institution.

Mr. Erskine: That is all.

Cross-Examination

By Mr. Lasky:

Q. Mr. Johnson, just a question or two. A few moments ago, you said in your telephone conversation with Etribou, you said something about freezing an account. The account you [644] referred to was the account of Lofendo at East Bakersfield?

A. That is correct.

Q. When you told Mr. Duncan to write a letter to Mr. Etribou giving him instructions to ignore

(Testimony of Kenneth M. Johnson.)

the advice of credit when it arrived, you did not tell Mr. Duncan to put in any clauses saying if, or, provided the Bank of America is not hurt, did you?

A. No.

Q. And when you saw the letter which was later shown to you by Mr. Duncan, before it was sent out, you observed, did you not, that it had no such if or buts in it? A. That is correct.

Q. You approved the letter anyway?

A. That is right.

Mr. Lasky: That is all.

Redirect Examination

By Mr. Erskine:

Q. Mr. Johnson with respect to what counsel was just asking you, that is, the subject of the grounds upon which you approved that letter, will you state why you approved the letter in the form which you did approve it?

Mr. Lasky: I think what went on in his mind and which was not expressed in any statement is immaterial and I object on that grounds.

Mr. Erskine: I think if he is asked why he approved the letter his attention is called to the fact he has approved this [645] letter, he has the right to state the reason for his approval.

The Court: He was not asked why. He was asked if he did approve it without condition.

Mr. Erskine: I think that is all. No further questions. I would like to call Mr. Messenger.

FREDERICK C. MESSENGER

was called as a witness on behalf of the Defendant, and being first duly sworn testified as follows:

Mr. Erskine: I would like to state that I am calling Mr. Messenger, as I also called Mr. LeRoy, under Rule 43 (B).

The Court: You are calling him under Rule 43 (B).

Direct Examination

By Mr. Erskine:

Q. Mr. Messenger, you had a telephone conversation with Mr. LeRoy on November 18th, did you not? A. I did.

Q. That conversation with Mr. LeRoy took place late in the afternoon of that day?

A. Yes, it did.

Q. Somewhere around five o'clock, Chicago time?

A. I do not know exactly what time it was but it was in that approximation.

Q. Somewhere between four and five o'clock, we will say, is that right?

A. Someplace around in there. [646]

Q. Did you put in the call or did Mr. LeRoy call you? A. Mr. LeRoy called me.

Q. Is it also true, is it not, Mr. Messenger, that early in the afternoon of that same day, November 18th, an employee of the Merchandise Bank advised you that there were being presented to the Merchandise Bank for payment checks drawn by the

(Testimony of Frederick C. Messenger.)

United Produce Company to the order of Lofendo amounting to about \$97,000?

A. There were a number of checks presented to me on that day. I do not recall whether there were just checks payable to Lofendo or whether there were others besides, because we were having quite a number of items coming in. But there were items which were payable to Lofendo in that group presented.

Mr. Erskine: At this time, if the Court please, in order to get those checks I would like to have an order directing that the deposition of Mr. Frederick B. Stocker be opened. The deposition I am quite sure is on file here.

The Court: The checks are attached to the deposition?

Mr. Erskine: That is my understanding, either the checks or photostatic copies of them.

Mr. Lasky: Counsel, I do not see any reason why we cannot stipulate very clearly as to any detail you want about these checks, when they were presented to Continental, when Continental got them, when Continental presented them to Merchandise, and when Merchandise rejected them. That is all clock work. [647]

The Court: Can't you stipulate to that, counsel?

Mr. Erskine: Oh yes. I think counsel is right. We will stipulate them now, Mr. Lasky.

Mr. Lasky: I can assure you I have not even read Stocker's deposition but whatever you tell me about the time will be all right.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: Five checks aggregating \$97,270, I believe, subject to correction, were these checks of the United Produce Company.

Mr. Lasky: It is \$97,207.50.

Mr. Erskine: \$207?

Mr. Lasky: Yes.

Mr. Erskine: Five checks aggregating \$97,207.50 drawn by the United Produce Company to the order of Frank C. Lofendo were presented through the Chicago clearing house by the Continental Illinois National Bank to the Merchandise National Bank on the morning of November 18th, 1948, that those checks were then delivered to Merchandise National Bank as part of the clearing operation that started at the Merchandise National Bank on the morning of that day, that the checks were then presented by an employee of the Merchandise National Bank to Mr. Messenger, and for Mr. Messenger's instructions as to whether or not the checks should be paid or rejected; that Mr. Messenger then directed the checks to be rejected, and at 1:30 on the afternoon of November 18th, Chicago time, the [648] Merchandise Bank, pursuant to the practice of banks in Chicago, telephoned the presenting bank, the Continental Illinois Trust Company, that it was rejecting the checks. That thereafter the Merchandise Bank, following that practice, actually delivered the checks to the Continental Illinois Bank on the following day, and that the day after the checks in ordinary course were returned by the Continental to the Bank of America.

(Testimony of Frederick C. Messenger.)

Mr. Lasky: I will stipulate to those facts with this understanding: That when you said pursuant to the practice of Chicago banks, you are relating to the fact that is existing in the case of items coming through the clearing house.

Mr. Erskine: That is right.

Mr. Lasky: I will stipulate to the facts but I object to the materiality of them.

The Court: Yes. It shows under your—

Mr. Lasky: This is more particular because I do not see how this has any bearing on the two counter claims and affirmative defenses. It is just an isolated fact, so far as I can see it.

Mr. Erskine: It is a fact, that I intended to prove that what Mr. Messenger said under direct examination and was excluded upon the ground that my questions relating to it were not proper cross-examination.

Q. Now, at the time you gave your instructions to return the checks, you knew, did you not, that they had been received by the Continental Bank on the day previous, that is, on November [649] 17th?

Mr. Lasky: If the Court please, I object to this as immaterial. What difference does it make?

Mr. Erskine: I will tell you what the purpose of it is, your Honor. The purpose of it is this: All of this line of questioning—the one that I hope to indulge in—is intended for this purpose: Our contention is that Mr. LeRoy came to the Bank of America on November 18th and told our officers

(Testimony of Frederick C. Messenger.)

and employees there—Mr. Duncan and Mr. Johnson, we will say—that the advice of credit had been sent out in error and that it was either revoked or that he wanted it revoked, depending upon which version is accepted, and they discussed at that time the question of whether or not the advice of credit should be revoked, and that at the time our people told Mr. LeRoy that they were willing to revoke the credit. They thought he might have a right to revoke and they were willing to help out to revoke the credit if our bank was not hurt. If that then Mr. LeRoy prepared his letter of November 18th and delivered it to Mr. Duncan, and that time Mr. LeRoy called up Mr. Messenger from the office of Mr. Duncan in the Bank of America to tell Mr. Messenger what had taken place in the process of advice of credit. At that time Mr. Messenger knew that the \$97,000 in checks had been rejected, and at that time knew or should certainly have had good grounds for believing that the Bank of America had paid the checks against \$97,000, but he did not see fit to tell Mr. LeRoy that, about those circumstances. So that Mr. LeRoy could [650] communicate those circumstances to the officers with whom he was dealing in the Bank of America. That is the purpose of this line of questions and I think it is entirely proper.

Mr. Lasky: I only want to take a moment. We have two different events with respect to a set of six checks for \$113,000. We have the fact that they

(Testimony of Frederick C. Messenger.)

were revoked. All the evidence agrees that at least there was a unilateral revocation. There is no dispute on that. Revoked, and the Bank of America knew about it long before they entered any credit on it, acted in any reliance upon it, paid out a single penny in reliance upon it seems to be their position.

Now, we have five other checks coming through on a different day which were presented to Chicago and rejected for lack of funds. What is the connection between the two? What difference does it make that on November 19th or late in the afternoon of the 18th, after all the other events have transpired, after Mr. LeRoy was through talking in San Francisco, Mr. Messenger knew then that his bank had rejected some checks because there were no funds? I see no connection. I submit there is none.

The Court: I do not see the connection there, counsel. I understand, of course, you have authority for your position, and I have not studied the law on the matter but I fail now to see the connection, but I am going to let it come in under the same reserved ruling, and permit you to go ahead, but I advise you, so you will understand, that I do not understand your [651] position. You can explain it to me with authority later. [651-A]

Mr. Erskine: I personally do not believe it needs authority; I think it is clear upon the face of it.

The Court: If it doesn't need any authority, I can rule on this right now. If you feel that way, I

(Testimony of Frederick C. Messenger.)

can rule upon this matter right now. If it is just based upon some reasoning without some authority to sustain you, I can rule upon it right now if you want me to.

Mr. Erskine: Well, I don't want you to.

The Court: Very well.

Mr. Erskine: I will be candid with you in saying that I haven't got any authority to directly support this question.

The Court: All right; let's go ahead, and I will let you put it in so that upon argument and explanation to me, I may see your point and follow it.

Mr. Lasky: Then I won't be repeating the objections; I will just make the general objection.

The Court: The same thing; it is going in under the reserved ruling.

Mr. Erskine: What was the last question?

(The reporter read the last question.)

A. It would be a natural assumption that the Continental had received them on the 17th.

Q. And you knew too, did you not, or you believed at the time you rejected the checks, that as the Continental had received them on the 17th and as they came from California, that they [652] had left California prior to the 17th? You believed that too?

Mr. Lasky: The witness is being asked for certain assumptions he may have made.

Mr. Erskine: I am trying to determine his state

(Testimony of Frederick C. Messenger.)

of mind, if the Court please, about those six checks. I think it is proper cross-examination.

The Court: I think that you will get it in eventually, so let's speed it up and do it the way you are doing. Go ahead.

A. It would only be natural to assume that they had left California before the 17th.

Q. (By Mr. Erskine): And you knew that at the time, you naturally had that in mind at the time you rejected the checks?

A. That is correct.

Q. In your telephone conversation with Etribou on November 17th, Etribou told you, as I remember your testimony, that the balance to the credit of the Lofendo account at the time he was talking with you was \$699? A. That is correct.

Q. A stipulation has been filed in this matter with respect to the difference between a cash letter and a collection letter, Mr. Messenger, and so I do not propose to examine you at any length with respect to that matter, but I will ask you this: When these checks were presented to you, when they arrived at your desk through clearings from the Continental—— [653]

Mr. Lasky: You mean the five checks?

Mr. Erskine: The five checks aggregating \$97,207 arrived at your bank in the morning or during the day of November 18th, you knew that the Continental had received those checks with a cash letter from the Bank of America?

(Testimony of Frederick C. Messenger.)

A. I had no knowledge how the Continental had received them.

Q. It is ordinarily the case, isn't it, in the practice in Chicago that when checks are presented through the clearing house there, that the presenting bank—that is, out of town checks are presented through the clearing house to the drawee bank that the presenting bank has received them from out of town with a cash letter; that is the ordinary practice, isn't it?

A. That is an ordinary practice, but not one that is always absolute.

Q. Are checks presented through the clearings by any presenting bank, out of town checks, that have not been received in what is commonly known as a cash letter?

A. I have known them to be, yes, sir.

Q. But ordinarily checks are presented, checks presented through the clearings, out of town checks have been received by the presenting bank with a cash letter?

A. That is normally the procedure.

Q. When those five checks were called to your attention there in the early part of the afternoon of November the 18th, did you believe at that time that the Bank of America had paid [654] checks against that \$97,000?

A. I didn't give any consideration to that at all; all I did was reject the items.

Q. At that time, Mr. Messenger, you knew that Mr. LeRoy was in California? A. Yes, I did.

(Testimony of Frederick C. Messenger.)

Q. And you knew that he had gone to California to discuss with the Bank of America the rejection of the advice of credit sent out with respect to the six checks?

A. As one of the matters that he was to cover.

Q. You talked to Mr. Etribou the day before, and Mr. Etribou had told you that the balance to the account of Lofendo was \$699?

A. That is correct.

Q. And you knew that these checks for \$97,000 had been sent by the East Bakersfield branch at least a day or so prior to November 17th; that is, sent by it to the Continental Illinois Bank? You knew that at the time, didn't you too?

A. I didn't just exactly get your question the way you put it, Mr. Erskine.

Q. What was it?

A. I didn't get your question.

Mr. Erskine: Read the question, Mr. Reporter.

(Question read by the reporter.)

Mr. Lasky: Can't we assume that the witness assumed if [655] something came through the mail from California it took some days?

The Court: Counsel may proceed.

A. Yes, that's right.

Q. (By Mr. Erskine): So you knew that, as the balance was \$699 on November 17th when you were talking with Etribou, and that if the Bank of America had paid checks against that \$97,000, the rejection of the checks by you would cause an overdraft in this account?

(Testimony of Frederick C. Messenger.)

A. I didn't look—

Mr. Lasky: I object to that as a hypothetical question; if he knew that the Bank of America had already paid it, this would cause an overdraft. That isn't asking what he thought or had in his mind; it is asking now if he made some conclusions upon certain assumptions, what conclusions would he have come to. It is all utterly foreign to the case.

Mr. Erskine: The purpose of the question is this, your Honor: that the witness has said when he rejected those \$97,000 in checks he didn't give any thought to what effect it would have upon the balance to the credit of Lofendo in the East Bakersfield branch and what relationship it would bear to the errand of Mr. LeRoy to secure a return of the advice of credit. I want to show that under the circumstances those facts must have been in his mind, he couldn't have escaped them. [656]

The Court: You can ask him, of course, if he did give consideration to certain conditions that existed.

Mr. Erskine: That is probably a better way.

The Court: Whether or not he must have had them in his mind then is a matter for you to argue.

Mr. Erskine: Yes.

Mr. Lasky: The particular question was that if he did know—

The Court: If he did know it, didn't an overdraft result?

Mr. Lasky: Yes.

(Testimony of Frederick C. Messenger.)

The Court: The objection is sustained.

Mr. Erskine: I will put it in the way the Court suggested. I shouldn't say that, but I will put it this way:

Q. When you rejected the checks for the \$97,000, did you have in mind that Etribou had told you on the previous day that the balance to the account of Lofendo was \$699?

A. I had no thoughts about the matter at all.

Q. You didn't consider that at all?

A. No; there were checks that were drawn against Merchandise National Bank and we were not paying any checks against the account, and this \$97,000 and other checks were referred to me for decision. I rejected them all.

Q. Did you notice that this \$97,000 in checks were drawn by the United Produce Company to the order of Lofendo? Did you notice that? [657]

A. I noticed that there were some checks drawn to the order of Lofendo.

Q. And that fact, that those particular checks were drawn to the order of Lofendo, did come to your attention, is that right?

A. There were some checks that were payable to Lofendo, and I noticed that.

Q. Mr. Messenger, did you also have in mind at the time you rejected those particular checks, the checks drawn by the United Produce Company to the order of Lofendo, that the Bank of America may have paid checks of Lofendo against the \$97,000?

(Testimony of Frederick C. Messenger.)

A. No, sir, I didn't have that in my mind.

Q. You had in mind, did you not, Mr. Messenger, that the checks were being presented through the clearings? That is right?

A. I knew that.

Q. And you had in mind that the normal practice — normally, usually checks presented to the clearings were received as cash items by the presenting bank?

A. I wasn't thinking anything about them; I was having certain checks presented to me for a decision, and I made the decision to reject them.

Q. You didn't consider at all then the fact that those checks, the \$97,000 in checks, were cash items, and that consequently— [658]

A. I knew they were cash items; they were presented to us from the Continental. We had to—

Q. Through the clearings?

A. Through the clearings. We had to reject them or pay them, and I gave instructions to reject them.

Q. If you knew that they were cash items, that they were checks drawn by the United Produce Company to the order of Lofendo, you had in mind at the time you rejected them, did you not, Mr. Messenger, that the Bank of America had paid checks against them and had given immediate credit for the checks?

A. I had no idea in my mind whatsoever.

Q. It didn't occur to you?

(Testimony of Frederick C. Messenger.)

A. I didn't think about it.

Q. You did testify, did you not, Mr. Messenger, that in your conversation with Mr. Etribou, Mr. Etribou told you that so far as the records of his branch were concerned, there were two collection items outstanding aggregating \$165,000, one for \$113,000 and one for \$52,000; you did testify to that, didn't you? A. Yes, I did.

Q. In that conversation that you had with Mr. Etribou on November 18th, I mean on November 17th, Mr. Etribou didn't tell you that he also had outstanding a collection item for [659] \$97,207, did he? A. No, sir.

Q. Did you have in mind when you rejected those five checks aggregating \$97,207 that that was one of the items—that that item, rather, was not mentioned as one of the items according to Mr. Etribou in your conversation with him on the previous day, was still outstanding from the East Bakersfield branch as a collection?

A. I wouldn't have known that; and I couldn't have been able to tell, because I only had the collection records of our own bank in front of me when you spoke about collections.

Q. Mr. Etribou told you that there were two collection items outstanding, one for \$113,000 and one for \$52,000, aggregating \$165,000; that is correct, isn't it? A. That is correct.

Q. Isn't it? A. That is right.

Q. And he did not tell you that there was a third collection item outstanding for \$97,007?

(Testimony of Frederick C. Messenger.)

A. No, he didn't tell me.

Q. So did you have in mind on November 18th, Mr. Messenger, when you rejected those five checks, that the Bank of America had given immediate credit for those checks to Lofendo?

A. I didn't have anything in my mind insofar as what the Bank of America was doing or had done with reference to these checks. [660]

Q. But you did see the checks, didn't you, when you rejected them? A. Yes, I did.

Q. And you did see that those were checks drawn by the United Produce Company to the order of Lofendo; that is correct, isn't it?

A. Sure.

Q. And you did know at that time that the bank that was handling checks drawn by the United Produce Company to the order of Lofendo was the East Bakersfield branch of the Bank of America? You did know that too, didn't you?

A. I knew that there was checks coming through right in front of me with the East Bakersfield endorsement bearing Lofendo's name, yes.

The Court: I think we might take a short recess at this point. The Court will stand in recess until 20 minutes after eleven. [661]

Q. At any rate, Mr. Messenger, when you talked to LeRoy on the afternoon of November 18th, did Mr. LeRoy discuss with you the revocation of the advice of credit for the six checks?

A. Yes, he did.

Q. At that time did you tell Mr. LeRoy that

(Testimony of Frederick C. Messenger.)

a few hours previously you had rejected checks drawn by United Produce Company to the order of Lofendo for \$97,000. A. No, I did not.

Q. Didn't it occur to you, Mr. Messenger, at that time that that was a fact in which Mr. LeRoy might be interested in discussing the situation with the officer of the Bank of America in San Francisco? A. No, it did.

Q. You recall, Mr. Messenger, on the morning of November 15th the Merchandise Bank received a wire from the Bank of America to the effect that three checks had been rejected by the Bank of America? A. Yes, I do.

Q. And you recall that those checks arrived at the Merchandise Bank, the checks that had been rejected, on November 17th? A. Yes, I do.

Q. On November 15th or 16th, do you know whether the Merchandise Bank or any officers of the Merchandise Bank had any conversation with the officers of the United Produce Company with respect to the three checks that had been [662] rejected? A. On November 15th or the 16th?

Q. Yes. A. I do not know.

Q. You do recall that there was a discussion with the officers of the United Produce Company on November 17th? A. Yes, I do.

Q. You recall, too, do you not, Mr. Messenger, that on November 17th the Merchandise bank received another wire from the Bank of America to the effect that additional checks of \$109,000, I believe it was, drawn by Lofendo to the order of

(Testimony of Frederick C. Messenger.)

the United Produce Company, had been rejected?

A. I knew that there was another wire that came in on the 17th listing some checks that were rejected by the Bank of America, yes. As to the amount, I did not make a computation of them at that time. They were listed individually, as I recall.

Q. And it was on November 17th that Rosen-thal was called in and disclosed the fact that he had been carrying on transactions which might cause the Merchandise Bank a severe loss?

A. That is correct.

Mr. Erskine: I will ask you, Mr. Lasky, if you have the original telegram dated November 17th, 1948, sent by the Bank of America to the Mer-chandise National Bank.

Mr. Lasky: Can you give me the exhibit num-ber?

Mr. Erskine: I do not believe this was intro-duced in evidence. [663]

Mr. Lasky: If it was not, I am not sure I could help you.

Mr. Erskine: It is not very important. I will ask the witness if he remembers the wire and re-members this is a copy of the wire.

(The document referred to was thereupon marked Defendant's Exhibit U for identifica-tion.)

Mr. Erskine: You stated, Mr. Messenger, as I understood you, that a wire was received by the

(Testimony of Frederick C. Messenger.)

Merchandise Bank on November 18th notifying it that additional checks were being rejected by the Bank of America, that is, checks drawn by Lofendo to the order of the United Produce Company. I will ask you if this paper, Defendant Exhibit U, is a copy of the wire to which you referred?

A. I think you stated received on November 18th.

Q. Oh, I meant November 17th. Pardon me.

A. We received a wire upon November 17th, and, as I recall it, the information contained in this copy here is apparently what was in the original.

Mr. Erskine: I would like to ask that that go in evidence.

The Court: Any objections to this copy going in?

Mr. Lasky: No, no objection. I do not see any relevance.

(The document referred to was thereupon received in evidence and marked Defendant Exhibit U.)

Mr. Erskine: Mr. Lasky, on page 48 of Mr. Messenger's deposition there is a reference to a defendant exhibit 6. [664] As I understand it, that was a permanent record kept by the Merchandise National Bank relating to the advice of credit respecting the three checks. I would like to have it.

Mr. Lasky: You say it is No. 6?

Mr. Erskine: No. 6, yes.

(Testimony of Frederick C. Messenger.)

Mr. Lasky: I will see if I can get it. This is it.

Mr. Erskine: I will ask that this be marked.

(The document referred to was thereupon marked Defendant's Exhibit V for identification.)

Mr. Erskine: I will show you this document, Mr. Messenger, which has just been marked V for identification, and ask you whether or not that is not the permanent record—

Mr. Lasky: We can stipulate as to that.

Mr. Erskine: This is the permanent record.

Mr. Lasky: This is the bank's permanent copy of that collection matter.

Mr. Erskine: That is all six checks.

Mr. Lasky: The six checks, the \$113,000, yes. If you want a further stipulation, the handwriting on it, other than the exhibit number, which was put on by a reporter, the handwriting on it is Mr. Messenger's handwriting.

Mr. Erskine: Yes. I will come to that. I would like to have this introduced in evidence.

Mr. Lasky: I have no objection.

(The document referred to was thereupon received in evidence [665] and marked Defendant Exhibit V.)

The Court: This is the bank's copy. We have already introduced the original.

Mr. Lasky: It has already been introduced, the advice that went out to the Bank of America. This

(Testimony of Frederick C. Messenger.)
is the copy that the Merchandise Bank would retain in its own files.

Mr. Erskine: This is the Merchandise Bank's permanent record.

Mr. Lasky: Yes.

The Court: Is there some necessity to have both?

Mr. Erskine: This is a point here, your Honor, that I want to mention.

The Court: All right.

Mr. Erskine: I think we can get a stipulation to this effect: the words "reversed and returned unpaid, 11-19-48 per A.R.LeRoy," with the initial underneath "M" are in the handwriting of the witness.

Mr. Lasky: That is right.

Mr. Erskine: And were put on there November 19th.

Mr. Lasky: Yes, that is right.

Q. (By Mr. Erskine): After the witness had talked to Mr. LeRoy about what had taken place in California, is that right?

A. Are you addressing a question to me now?

Q. Yes. A. Yes. [666]

The Court: Very well.

Mr. Erskine: And the stamp on this thing too, "paid November 15th, Merchandise National Bank" is the stamp of the bank.

Mr. Lasky: Yes, and if you are going further, there is a line drawn through the word "paid" and the line was put through the word "paid" when he wrote the notation on here.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: That is all right.

Q. Mr. Messenger, without digging up the papers, the Merchandise Bank sent out not only the advice of credit but also an acknowledgement of receipt of the six checks on the same day?

A. That is correct.

Mr. Lasky: That is in evidence.

Q. (By Mr. Erskine): It was the usual practice of the Merchandise National Bank, was it not, in a situation in which they were entering checks received by them, drawn on them as debits, when they were entering them as debits, to send out with the collection letter, when they were receiving such checks, with the collection letter, an acknowledgement and the advice at the same time?

A. No, the practice of the bank in receiving from any other source was to acknowledgement the receipt of the collection and then, of course, the advice would be the disposition of it. Now, they are not both handled at the same time. It might be that both went out on the same day. [667]

Q. Well, it is not important, but on page 34 of your deposition you testified as follows:

“Q. Is it the practice of your bank on receipt of a collection to send out an acknowledgement to owner and on the same day send out the advice on the disposition of the item to the owner.

“A. If the collection is paid on the date it was received then the practice is to send the acknowledgement and also the advice.

(Testimony of Frederick C. Messenger.)

"Q. And that was done in this instance?

"A. Yes. sir."

The Court: That is what he has just testified to, isn't it?

Mr. Erskine: Well, I did not quite understand it that way, but substantially that way.

Q. Now, Mr. Messenger, during 1948 up to November 17th whenever United Produce Company was drawing against uncollected funds in its commercial account, your bank would charge the United Produce Company interest on such drawings, would it not?

A. I knew nothing about anything at all of the United Produce Account prior to November 17th. Now, if you are asking me about what I have found out since, perhaps I could answer it.

Mr. Lasky: Never mind what you have found out since.

Q. (By Mr. Erskine): I am asking you if it was not the practice of your bank—let me put it this way—to charge a [668] customer interest on checks drawn by your customer against uncollected funds?

Mr. Lasky: I think that is immaterial. It has no bearing on any issue in the case whatsoever whether they charged or did not charge interest. If they did, it would be appropriate, if they did not it would be irrelevant.

Mr. Erskine: It has this bearing, your Honor: one of our points is that the Merchandise Bank was loaning the United Produce Company in ex-

(Testimony of Frederick C. Messenger.)

cess of the legal limit, creating the credits which made possible the continuance of this kite. We want to show as part of that situation that the Merchandise Bank was charging the United Produce Company interest on the float or the drawings against uncollected funds, and that that was considered by the bank as part of the indebtedness owing by United Produce Company to it. On which it was charging United Produce Company interest. That is the purpose.

The Court: What difference would it make?

Mr. Erskine: It shows the bank regarded the float as an obligation to it upon which it was entitled to interest. That is the purpose.

Mr. Lasky: In the first place, if the Court please, if it is a loan, it is a loan whether they charged interest or not. But beyond that I think we have reached a point where there should be a disposition of this whole contention, that whether or not we exceeded the loan limits has no bearing on this case. [669] Obviously it cannot have a proximate causal relationship. Suppose our bank, instead of being a relatively small bank, was a huge bank with large assets and capital—say assets and capital of \$100,000,000—in which event its loan limit to any single customer would have been \$10,000,000. It would have had no bearing on the Bank of America. Then we would not have been violating the loan limits if we lent up to \$9,000,000 to this customer. How could the fact that our bank was a much smaller bank instead of a much larger

(Testimony of Frederick C. Messenger.)

bank, so that a certain amount of loans may or may not have been too high, have any bearing on a loss that the Bank of America has suffered? And that is only part of the question because only the Federal Government can raise the point.

Mr. Erskine: May I answer that, your Honor?

The Court: I do not want to rule upon the matter at this point. If counsel want me to, of course, I can, but I think it is to the advantage of all parties that I do not rule upon it at this point, so that I fully understand the position of both sides to the question. But aside from that point, now, with reference to this immediate point, I do not follow your position there, counsel. Can you explain that to me so I can see what bearing it has on the matter?

Mr. Erskine: Section 84 provides that no obligation shall be incurred by any person to a national bank in excess of 10 per cent of the capital and surplus. I want to show and it will be [670] our contention that when a bank permits a customer to draw against uncollected funds, the customer is not using his own funds, but using the funds of the bank and that therefore the customer is incurring an obligation to the bank and that the bank recognizes that as such by charging him interest on the uncollected funds, on the float.

The Court: The relationship of debtor and creditor exists whether you call it a loan or what you call it, does it not? What difference does it make? The amount of the loan and the bank's financial

(Testimony of Frederick C. Messenger.)

condition with reference to the amount of the loans it could grant is already stipulated to and is in evidence, isn't it?

Mr. Lasky: I do not believe that has been reached yet.

Mr. Erskine: I do not believe it has.

Mr. Lasky: It is a fact we can readily stipulate to. Of course, we will object to its relevance.

The Court: Whether it exceeded that is a fact that you can stipulate to in any event.

Mr. Lasky: No, the point is, your Honor, that counsel has not stated Section 84. Section 84 has a series of 10 or 15 exceptions which do not come under the limitation. This, for example: If this were a loan against the checks, it would fall under one of the exceptions, which is a loan against commercial paper, namely, checks endorsed by the payee covering the signature of the maker. We certainly would not stipulate [671] that we exceeded the loan limits because we definitely deny any such thing. The loans not clearing under the exemptions, we say, were under \$200,000. Those others were definitely covered by one or the other of the several different exemptions. And this matter of checks, if it is a loan to permit a customer to draw against deposited checks before collection, that is, within our judgment, within one of the exceptions. That is why this issue complicates the case.

The Court: It just keeps growing, but the Court is in a position with being stuck with it at this

(Testimony of Frederick C. Messenger.)

point, and I am going to receive the evidence so I can rule on the entire thing. Proceed. [672]

A. No, we made no such charge at all. You are talking about analysis and results. In the analysis of accounts—

Mr. Lasky: I move to strike the witness' last remark as non-responsive. He said they made no interest charge. That is the responsive answer.

The Court: Very well; it may be stricken.

Q. (By Mr. Erskine): You did make a charge against the customer, an interest charge against the customer which included as one of the elements of the charge, or one of the elements upon which the charge was based, the amount of the float of the customer—the amount of float in the customer's account; is that right?

A. We made a charge against our customer's accounts after considering all activities; debits and credits in the account, we made a net charge of what results were discovered or disclosed, rather.

Q. And one of the elements upon which you based that net charge was the amount of float in the account if there was any such float?

A. If there was such a float, it would be considered as an element.

Mr. Erskine: I think that is all, your Honor.

Mr. Lasky: No questions.

The Court: Very well. Call the next witness.

Mr. Erskine: I haven't got any more witnesses at this [673] juncture, your Honor, but I have the depositions we can discuss.

The Court: All right; what is the situation with reference to the depositions?

Mr. Lasky: Counsel gave me last night a list of several hundred pages, and I looked them over, that is all I know about them. Most of them seem to be identifying documents.

Mr. Erskine: That is right; most of them do deal with that, your Honor.

The Court: You can stipulate as to the documents then? Is that all that is—

Mr. Erskine: Well, the deposition contains descriptions of the documents.

The Court: As to what the documents are, you can stipulate as to what the documents are.

Mr. Lasky: What I would suggest he do is to make an extract from his depositions or make his descriptions on paper and we could put it in as a stipulation, if they are material. A lot of these documents are already in. They seem to be referred to. A lot of them I think are merely irrelevant, others are duplications, and so forth.

Mr. Erskine: It would be a monumental task. It isn't like summarizing the testimony of Lofendo and Gassman. Mr. Messenger's deposition covered, according to my recollection, some 500 pages, and if I were to attempt—

Mr. Lasky: Six hundred pages. I think you even got up to [674] 600 before you were through.

Mr. Erskine: If I attempted to do what counsel suggests, it would take me at least a week's time. I believe it would be better to suggest that I be permitted to introduce in evidence the por-

tions of Messenger's deposition which I have already indicated to counsel, I don't think it will take much time. I could file a paper stating the pages with the reporter.

Mr. Lasky: There are some parts of this, great parts of it, I think do not belong in the case at all.

Mr. Erskine: I consider that all the parts indicated belong in the case, your Honor.

Mr. Lasky: Do you propose to offer in evidence all the documents which are identified here? You used a clam shell dredge in the depositions and dredged up all the records we have, practically. Is all of it going in?

Mr. Erskine: Yes, I am going to offer it all in evidence as part of my case, all those exhibits that I have indicated here, unless we can stipulate to the schedules prepared by Mr. Tobey upon the basis of those exhibits, which schedules I gave to counsel yesterday.

The Court: Then if a stipulation can be made with reference to the schedules we can eliminate all of the other documents and depositions?

Mr. Erskine: We can eliminate a large part of the Messenger deposition; yes, your Honor. [675]

Mr. Lasky: I am prepared to talk on this question of schedules, and almost none of them are in a form I would stipulate to. I don't think that we would have any trouble arriving at a stipulation on some of these matters. I am prepared to take them up with you in open court or in chambers, or between the two of us. I think we can make some progress that way. You gave us five schedules.

Mr. Erskine: Yes; there were a couple more that were not entirely completed.

The Court: How many of the witnesses are you going to have?

Mr. Erskine: I think, your Honor—I am not positive of this, but I think I will call two more witnesses.

The Court: Who will they be?

Mr. Erskine: Well, I am considering this; I don't know whether I will do it or not; I haven't thoroughly made up my mind yet on that. We have these stipulations to take care of and the depositions and so forth, and that is going to consume some time, at least an afternoon, I believe. It occurred to me that I would like to call—that I may call—I haven't made up my mind to it—that I may call two expert witnesses, one an accountant, and one a banker, to testify with respect to the practices of the Merchandise Bank in this case and the practices of its auditor.

Mr. Lasky: Expert witnesses to testify that they considered [676] the practices of Merchandise were good or not good banking practice?

Mr. Erskine: Well, it might not be quite as blunt as that, but it would amount to that.

The Court: Then what good would it do me?

Mr. Erskine: It is our contention, your Honor, that the Merchandise Bank was negligent in this case.

Mr. Lasky: You mean we have got to get experts too on the same subject?

Mr. Erskine: Well, perhaps.

Mr. Lasky: Which I could get without any trouble.

Mr. Erskine: Perhaps you could and perhaps you couldn't. I don't know.

The Court: You know, I just don't think that an expert knows anything more about it than anyone else does, as to whether or not a loan should be made. The relationship between a bank and a customer is one that I just don't believe you can expert. The confidence that you have in your fellow members of the bar, as to some of them it is one thing, and as to others it is another. Now how can that be experted? Whether or not I have or should have confidence in any particular person cannot be the subject of expert testimony. And that is the whole relationship between banks and customers, is one of confidence, personal confidence.

Mr. Lasky: Exactly. [677]

The Court: That is the whole history of banking, isn't it?

Mr. Lasky: If your trust is misplaced in somebody, you get swindled.

Mr. Erskine: I don't think that that is the situation here.

The Court: Then you are going to have them testify of course under these circumstances this bank should not have had any confidence in the United Produce Company?

Mr. Erskine: No, I am not going to say that. For example, I am going to say in this case that an accountant, if I call him, and as I haven't made up my mind on it—I can call his attention

to the condition of the United Produce Company books, the findings that Mr. Tague made with respect to those books and I may ask him whether or not upon an order that those books which will be presented to him, certain facts would be disclosed following out the usual and ordinary accounting procedure, auditing procedure.

The Court: You can stipulate to all that. The record speaks for itself. I am sure you will not have any difficulty on that score. The ledger reflects the balance or condition, what the condition between the bank and its customer is. I think you can all stipulate to that. But certainly an expert cannot tell anyone as to whether or not—Of course the bank may have made a mistake, and the Bank of America may have [678] made a mistake, but it isn't based upon a question of expert testimony. It just is of no assistance.

Mr. Lasky: In effect, what counsel is doing is to call or propose to call a grandstand quarterback after the game is over and to say "Now looking at it in retrospect you can see that you made a mistake." We know that ourselves.

The Court: You can still present the testimony. I will consider the matter in the meantime, because I don't just see upon what basis it would be worth anything in the determination of the matter.

Mr. Erskine: As I said to the Court, I am not convinced myself that I will present it, but I am considering it. If I reach a conclusion that I feel it is essential for me to do so, I would like an opportunity to present it, or to offer it at any rate.

The Court: Yes, and then that will be all?

Mr. Erskine: That will be all.

The Court: In other words, you are through with the live testimony if you decide not to produce some experts?

Mr. Erskine: That is right.

The Court: Then we will meet again this afternoon, and if you are going to have other witnesses, have them here at two o'clock.

Mr. Erskine: I can't have them here at that time, your Honor. [679]

The Court: Why not?

Mr. Erskine: I haven't got them prepared.

The Court: Mr. Erskine, that isn't—when are they going to be prepared.

Mr. Erskine: I thought I was going to have until Monday, and there is plenty to do between now and Monday in this case with the depositions and the stipulations.

The Court: Can you finish up all of the work, can you have all the stipulations and everything completed by Monday?

Mr. Erskine: I haven't dictated the end of that long stipulation on which we were working, but I planned on getting that out either this afternoon or tomorrow and I probably could discuss it with Mr. Lasky tomorrow and see if he and I could reach an agreement on it.

Mr. Lasky: I will be available at your pleasure at any time late this afternoon or any time on any of this work.

Mr. Erskine: But I have an idea that—

The Court: For example, if it got to this point, Mr. Erskine, where you decided to present your experts and I decided to hear them, do you have any idea how long those experts would take?

Mr. Lasky: There would certainly be cross-examination.

The Court: I think they would be here for a week under those circumstances. You better get your experts. What do you have to do with an expert to prepare him? If he is an expert, [680] all you have to do is to propound your questions to him.

Mr. Erskine: Well, he has to see the papers upon which I am going to question him.

The Court: You can present them to him here in Court.

Mr. Erskine: He won't have any opportunity to study them and consider them and to reach an opinion about them.

The Court: Well, we will find out about that. Bring him here. Have him here at two o'clock.

Mr. Erskine: I can't get him here at two o'clock.

The Court: Why not?

Mr. Erskine: Because they are not available; they won't be available at two o'clock.

The Court: Have you subpoenaed them?

Mr. Erskine: No, I have not.

The Court: You get hold of them and get them here at two o'clock and we will proceed. I am not going to waste today and tomorrow, Mr. Erskine. You get your witnesses and we will be ready to go at two o'clock with them.

Mr. Erskine: Well, they won't be here; I can't get them here.

The Court: Well, that is, of course, up to you. I have advised you all along how many days we have immediately available to us. Of course I understand that we have got time available in the future ad infinitum, but that doesn't relieve your responsibility, Mr. Erskine, to have the witnesses here. [681] Now just to say that they can't be here is no proper excuse to the Court unless you can tell us why they can't be here.

Mr. Erskine: Well, I think I have made it pretty clear to the Court that I have not yet gone over the facts with them with respect to which I may want their opinion. I don't know whether I will offer the evidence.

The Court: I know, but the case has been set for trial. How long has it been on the ready calendar?

Mr. Lasky: About three weeks on the ready calendar.

The Court: We have been here in Court for ten days.

Mr. Erskine: Yes, but I have done an enormous amount of work on the case while the case was being tried, and there is plenty of work to do in the case between now and Monday. And I understood that I was going to have Monday if I needed it, and I thought I could—as a matter of fact, I have engagements with these men on Sunday; at least, I have an engagement with one of them Sunday. However, if that is the best I can

do, if the Court insists that they be here, the only thing I can say is that I can't get them here.

The Court: I will tell you, Mr. Erskine, I think in order for you to protect yourself in the matter, you had better make a formal showing this afternoon at two o'clock as to what you want to do and why you can't do it at this time, because I think you should be protected in the matter. You may have the opportunity to protect yourself, and I will consider the [682] matter further in the meantime. But you can observe my disposition in the matter.

Mr. Erskine: That is pretty clear, your Honor.

The Court: As I say, I don't think that it is fair to the Court to be continuing the matter when it is obvious that if the evidence is admissible and the Court hears it, it is going to take a considerable time.

Mr. Erskine: Well, not as I envisage it.

The Court: Not as you do, no. Of course your matter is simple; you prepare your expert, and you ask him one or two questions—qualify him and ask him one or two questions, but the cross-examination is unlimited when you get to that sort of thing.

Mr. Erskine: As I understand it I don't believe that would be the case here. Of course I have been mistaken before in matters of that sort. However, the way I contemplated the course of the trial was that I was to deal with these depositions; we have these schedules which I have presented to counsel; we have the stipulations which have

not been completed and which have taken considerable time and which will take considerable more time.

The Court: It was my understanding that all this was going to be done with reference to the stipulations and the reduction of the depositions, was going to be done and agreed to between the two of you out of court, and then if there [683] were any questions that then arose you would come to see me during the next week during the judicial conference. Wasn't that the understanding?

Mr. Erskine: We can handle it that way, your Honor.

The Court: That was what I understood.

Mr. Erskine: We will handle it that way if the Court wishes.

Mr. Lasky: If that is the way to handle it, that is the way to handle it. I had not myself understood that to be so, and I was hopeful that the case would be concluded because I don't like to hold these gentlemen from Chicago until the following week, as I would have to do if I had any rebuttal. But if that is the way it has got to be, that is the way it has got to be. We are going to try this case to a conclusion.

The Court: Yes.

Mr. Lasky: But I don't see why it ought to take that amount of time. I have been handed five or six schedules. I thought we were going to have schedules which merely summarized figures on the books. They are not. They tend to be comparisons of one book with some other person's

record put together in the form of an argument. That is what they really are according to our theory. We would break them down and put in one set of figures. And if counsel on argument wants to correlate them, that is different.

The Court: Yes. [684]

Mr. Erskine: I don't agree with counsel's interpretation of the schedules. It is true they relate to more than one record, and they are drawn off of the records as we understand them.

Mr. Lasky: Some of them, for example, apparently by Mr. Tobey are based upon a comparison of Bank of America records with our records and the Bank of America records were not accessible to us at the times in question, and they tend to prove facts to which we would have had not access at the time. Because they have not been extracted by Mr. Tobey, is no reason—

Mr. Erskine: That is just what the facts are, all the records.

Mr. Lasky: All right, but those things I can't stipulate to. And before I would agree to such a schedule going in, I would want it definitely established, either by stipulation or let you do it by testimony—if we are to be held chargeable with negligence, which is the theory of the defense, upon the basis of knowledge we could not have had, at least I want the record to show what the schedules are. There are several things like that which I think we can dispose of pretty quickly when we sit down together.

Mr. Erskine: I don't agree with your interpre-

tation but be that as it may I would like to sit down and try to agree with him about it. [685]

The Court: Do you think it could be worked out quicker by working in Chambers with me?

Mr. Lasky: I am inclined to think so, if the Court please. If I may put it this way, I think the Court acts as a catalyst in such a matter and facilitates it.

The Court: It may very well be that you eliminate some arguments between counsel sometimes.

How can we finish the case and give you all a full opportunity? I don't want to cut you out, Mr. Erskine, but goodness, I don't understand how you come up to the trial of the case and do not have your witnesses available.

Mr. Erskine: Well——

The Court: This isn't the matter that has just arisen. This case, in your theory of it, has been in your mind from the start.

Mr. Erskine: That is right.

The Court: We will adjourn until 2:00 o'clock this afternoon, have your witnesses here. You say "of course I haven't talked to them."

Mr. Erskine: That is so, your Honor, but I assure you that I have been plugging away at this case.

The Court: I know you have, Mr. Erskine.

Mr. Erskine: The material is enormous and I have been working quite hard at it. And it is also true that the time that ordinarily would intervene between now and Monday morning [686] isn't very long and that there are plenty of things that can be done in that time. However, I don't know——

The Court: If we work this afternoon and tomorrow on these various matters that are here, then on Monday you will have your other witnesses then available?

Mr. Erskine: I am not sure that I am going to call them, your Honor; I haven't made up my mind.

The Court: Then of course we are up against this other proposition; that then during the rest of the week if we are not through with those witnesses on Monday, we are going to have to start meeting at six o'clock in the morning until ten o'clock and from six or seven o'clock in the evening until ten or eleven o'clock at night. That is what we are going to have to do next week.

Mr. Lasky: May I make a suggestion for what it is worth? If we meet in the Court's Chambers this afternoon and have a Court Reporter available, I think as we move along we might be able to make a stipulation, button it up and move on to the next one instead of going back to our offices and trying type them.

The Court: Very well. The Court will recess at time. Counsel will meet with the Court in Chambers at 2:00 o'clock this afternoon and the reporter will be present. We may be able to make the stipulations and get them in the record and quickly dispose of some of the matters right then and [687] there.

Mr. Erskine: That will be fine.

The Court: Rather than waiting to have them written up and that sort of thing.

Mr. Erskine: That would be fine if we could do that.

The Court: Very well; the Court will recess.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [687-A]

Monday June 26, 1950, at 10:00 o'Clock A.M.

The Clerk: Merchandise National Bank vs. Bank of America on trial.

Mr. Lasky: Ready. If the Court please, I can bring up the subject of our resume of the Gassman and Lofendo depositions.

Mr. Erskine: Well, I have been over those, your Honor. Now first of all, taking up the Lofendo deposition, there is a part here that I couldn't find. I guess it is in there. Would you mind pointing out to me this part?

Mr. Lasky: Yes.

(Discussion between counsel out of hearing of the reporter.)

Mr. Erskine: Well, that seems to be all right, then, your Honor.

The Court: All right.

Mr. Lasky: Well then, it is therefore stipulated that the document I now have in my hand, entitled "Stipulation—"

Mr. Erskine: Pardon me just one second. Is there any reference to this proceeding?

Mr. Lasky: Yes, the very beginning (indicating).

(Conversation out of hearing of the reporter.)

Mr. Lasky: Well then, it is hereby stipulated, is it not, Mr. Erskine, that the paper I have in my hand, entitled "Stipulations concerning the testimony of Frank C. Lofendo" may be received in evidence as Plaintiff's Exhibit next in order, as truly [688] representing, for the purposes of this case, the testimony of Frank C. Lofendo?

Mr. Erskine: That is right.

The Court: Very well, marked in evidence.

(Whereupon stipulations concerning deposition of Frank C. Lofendo referred to above, were received in evidence and marked Plaintiff's Exhibit 23.)

Mr. Erskine: Now the Gassman deposition, your Honor, which I had a chance to go over carefully, and the Lofendo, presents quite a bit of difference and some difficulty. I personally believe it would be better to put the deposition itself in evidence than to put this statement in evidence, modifying as I believe it should be modified. I think it would save time and it would, too, I believe, have a certain benefit that would not be obtained by reading the statement, which benefit that is according to my view of it, at least, the witness upon testifying was making an effort to state very accurately the facts concerning which he was testifying. Now I would rather put in the deposition itself and go over this statement. I make that suggestion.

Mr. Lasky: Well, I mean, it is purely up to you. If you don't care to stipulate, that is all right.

The Court: Very well, let's put it in.

Mr. Lasky: Now, that raises just one problem. Incidentally I just offer the direct examination, because it so happened that [689] the cross-examination, so called, was not cross-examination at all but went into another subject matter entirely.

Mr. Erskine: I would like to say, my suggestion is that just the direct examination go in.

The Court: Very well, just the direct examination.

Mr. Lasky: All right, then, I will offer the direct examination of the deposition of Sam Gassman, taken on behalf of the Plaintiff, and it may be received, if your Honor please.

The Court: Yes.

Mr. Lasky: Now the one problem that may take a moment is that there were numerous exhibits marked for identification here, and I think we ought to go through here and by stipulation agree as to what they were, so we won't have to start putting them all in those exhibits, putting all those exhibits in evidence at this time.

Mr. Erskine: That's right. But I would like to put in the list, exhibit 16, the two lists.

Mr. Lasky: May I ask then that that deposition be now opened?

The Court: Yes, the deposition may now be opened.

(Whereupon conversation was had among court and counsel regarding whereabouts of said deposition.)

The Court: Well, the Court will stand in recess for fifteen minutes, and we will see if we can get

in touch with the other clerk. I will look in Chambers and see if by chance it is in there.

(Recess.) [690]

Mr. Lasky: We have located it.

I have gone through the list of some 19 groups of exhibits in the deposition, and I would like counsel to give me one stipulation which will avoid putting in complete photostatic deposit slips of the East Bakersfield Branch. Those were all shown to the witness, and the witness asked as to whether they were in his handwriting. He said one group was and one other group was not.

Mr. Erskine: Yes.

Mr. Lasky: Instead of putting in all these various groups, can we not stipulate in the form in which I proposed in the proposed draught stipulation; that the witness was presented with all the deposit tags in the Lofendo account, taken from defendant's files, and testified that all of the deposit slips dated on or after September 16, 1948, were filled out in his own handwriting, including the name "Frank C. Lofendo" written at the top of each slip as the name of the depositor; that on the deposit tag dated November 10, 1948, which has already gone into evidence in this case, the writing at the top: "Frank C. Lofendo, Bakersfield Inn, November 10, 1948," was in the witness' handwriting, and the numerals below are in the handwriting of one of the employees of United Produce Company working under him. This will obviate the necessity of putting in those several

groups of deposit tags in order to correlate them with all the original deposit tags which we will also have to put in [691] evidence further.

Mr. Erskine: I will so stipulate.

The Court: Very well.

Mr. Lasky: Then I would like to offer in evidence—

Mr. Erskine: Does that cover the amounts? Whose handwriting were the amounts?

Mr. Lasky: Everything was in his handwriting on all of the deposit tags from and after September 16, except on the one of November 10, in which the name at the top and the address and November 10, are in his handwriting, and the numerals underneath are in the handwriting of one of the employees under him.

Mr. Erskine: When you are referring to "his," are you referring to Gassman?

Mr. Lasky: Gassman personally.

Mr. Erskine: Yes, that is right.

The Court: Very well.

Mr. Lasky: I offer in evidence, if the Court please, at this time the exhibits which were marked on the Gassman deposition for identification as Plaintiff's Nos. 7, 8, 9, 14, 15, and 16. Do we have those available here? Perhaps I have the originals right here.

Here is 7.

The Clerk: This is number 16. They would be given—

Mr. Lasky: Those are photostats. I have the originals in my possession. The originals were re-

turned to me and the [692] photostats were returned with the deposition. That is correct?

Mr. Erskine: Yes.

Mr. Lasky: That is 7, which will go in as Plaintiff's Exhibit—

The Clerk: Plaintiff's Exhibit 24 in evidence.

Mr. Lasky: Then 8 on the deposition.

The Clerk: 8 on the deposition will be Plaintiff's Exhibit 25 in evidence.

Mr. Erskine: 9 will be 26.

The Clerk: Plaintiff's Exhibit 26 in evidence.

Mr. Lasky: I also want to offer 13.

The Clerk: Plaintiff's Exhibit 27 in evidence.

Mr. Lasky: There is a group which together was marked 14, which will go in as 28.

The Clerk: Plaintiff's Exhibit 28 in evidence.

Mr. Lasky: No. 15 was just a huge book of blank checks; I don't see any point of putting that in.

16 is the pencil memorandum.

Mr. Erskine: That is the memorandum?

Mr. Lasky: That will go in as the next one.

Mr. Erskine: Was it two memorandums or just one.

Mr. Lasky: No. It is one memorandum, two columns, one on each side of the sheet.

The Clerk: Plaintiff's Exhibit No. 29 in evidence.

Mr. Lasky: If the Court will pardon me just a moment, I [693] have two or three more exhibits to check through here to see what they were.

The 17 group.

The Clerk: Plaintiff's Exhibit No. 30 in evidence.

Mr. Lasky: In order that we may avoid putting in a lot more papers, may it also be stipulated that when the witness testified that he kept in the files of United Produce Company triplicate copies of the deposit slips that had gone to the East Bakersfield Branch, and produced them those that he had were copies of the deposit slips that had gone to East Bakersfield?

Mr. Erskine: That is right.

Mr. Lasky: And when he said that he received back duplicate copies, that the ones that he produced as the duplicates are in fact, the duplicates?

Mr. Erskine: That is right.

The Court: Very well.

Mr. Lasky: Then I think the last group I have here, Mr. Erskine, will be the last group of exhibits which were numbered 19, instead of putting them in evidence—they were forty odd checks—I would like a stipulation from you that Exhibit No. 19 consisted of forty-two original checks of United Produce Company, each payable to Frank C. Lofendo, bearing the rubber stamp endorsement "Frank C. Lofendo," drawn on the Merchandise National Bank, and these in fact constitute the last thirty-eight items which had been credited to the Lofendo Account [694] at Defendant's Branch prior to November 10, 1948, plus four checks which were credited at the East Bakersfield branch on November 17. I have checked them against the record, and that is precisely what they are.

Mr. Erskine: Well, if you say that, Mr. Lasky—it is a little difficult for me to follow—if he says it, I will take it, subject to my rights to check against it and to call to the Court's attention and to Mr. Lasky's, any error I may find.

The Court: Very well.

Mr. Lasky: I would like to leave with the Court, it isn't an exhibit, of course, this proposed stipulation with reference to the deposition of Gassman, simply with my representation and it is a resume of the testimony.

The Court: Submit it with your memorandum.

Mr. Lasky: With the memorandum?

The Court: Yes.

Mr. Lasky: I will do that.

Mr. Erskine: Your Honor, in chambers the other day, on Saturday, we were discussing certain things which I would like to take up first.

There was a discussion, as I remember it, as to whether or not Mr. Tobey and Mr. Messenger could get together and agree on a stipulation with respect to the amount of the float in the Merchandise account with the East Bakersfield Branch. My understanding [695] is that they got together—whether or not they agreed I don't know—but we have here a schedule showing the amount of the float in that account, the account of United with Merchandise.

The Court: Do you think, gentlemen, we would proceed faster if you went into chambers and sat around the desk or table in there with reference to this if there is going to be some further discussion as to what this does represent?

Mr. Lasky: My impression—I haven't seen what he has there—is that we can proceed without any difficulty right here.

The Court: Very well.

Mr. Erskine: Perhaps you could look at that.

Mr. Lasky: Let me ask Mr. Messenger.

Well, I will stipulate that the document that Mr. Erskine has given me—this document is called "Analysis of Checks of Frank C. Lofendo deposited to United Co. Commercial Account"—and I make no stipulation with respect to that caption.

Mr. Erskine: We will strike the caption then.

The Court: The caption may be stricken.

Mr. Lasky: What I do stipulate to is that the document correctly shows the dates on which checks in certain amounts were deposited, or rather credited, on United Produce Co. Commercial ledger sheet with Plaintiff's Bank. It also shows the date upon which they were assumed to be good, on the assumption [696] that in four days they were good.

Mr. Erskine: Under the column "Date Good."

Mr. Lasky: Under the column "Date Good" and that under the last column entitled "Float," Mr. Tobey has correctly used the arithmetic to determine the amount of float, which in every case is the amount of checks; is that right?

Mr. Erskine: Yes.

Mr. Lasky: All right.

The Court: Very well.

Mr. Lasky: I make my objection to the materiality.

The Court: Yes, surely. It is admitted, as most

of the evidence has been, subject to the objections on each side.

Mr. Erskine: I would like to have this then marked, Mr. Clerk, as Defendant's Exhibit next in order.

The Court: Yes, it may be marked and admitted in evidence.

The Clerk: Defendant's Exhibit OO in evidence.

Mr. Erskine: Now, Mr. Lasky, do I understand you to say that you will not stipulate that these checks covered by this Exhibit, Defendant's exhibit OO are not the checks of Lofendo deposited to the Credit of United Produce Company in the Merchandise National Bank?

Mr. Lasky: No, I won't stipulate that, because I know nothing about it. I understand that these figures compare and are identical with figures appearing in the Lofendo account on days near to the dates of these checks, but whether or not they [697] are Lofendo checks I have no way of knowing. You may draw your inference that as same amounts here on closely related dates they are the same checks.

Mr. Erskine: They are the same items that appear on the Gassman list.

Mr. Lasky: I wouldn't be surprised that that is so, but I don't know.

Mr. Erskine: Would you pardon me one second, your Honor?

The Court: Yes.

Mr. Lasky: With respect to the Gassman deposition, I am not sure what practice we have been

following—whether I asked that it be offered in evidence and it should be marked as the Plaintiff's Exhibit or not. If so, I would do it.

Mr. Erskine: I didn't hear that, counsel.

Mr. Lasky: I was referring to the Gassman deposition, your direct examination. I don't believe we gave it an exhibit number.

The Court: Was a number given to it?

The Clerk: No.

The Court: I think that we gave the other deposition that was in a number.

Mr. Lasky: Yes we did.

The Court: Assign a number to it, the next in order.

The Clerk: The deposition of Sam Gassman is Plaintiff's Exhibit No. 31 in evidence. [698]

Mr. Lasky: Of course, that pertains just to the direct examination.

The Court: Just to the direct, yes.

Mr. Erskine: In view of the point that counsel and I were just discussing, that is, the question whether or not the checks referred to in the last exhibit were checks of Lofendo drawn on the East Bakersfield Branch and deposited to the credit of United Produce Company account in the Merchandise Bank, I would like to introduce these checks, which were the November checks which the Bank of America retained and still had in its hands when the blow-up occurred.

Mr. Lasky: You won't need to do it, counsel. If you have you have actual checks showing Lofendo

items, so that we know they are Lofendo items, I will stipulate that those checks on your list are Lofendo items.

Mr. Erskine: I see.

Mr. Lasky: While we have facilities while we can readily determine that, I will accept it.

Mr. Erskine: There are the checks.

Mr. Lasky: Mr. Tobey, you have in fact taken these checks and checked them off against your list?

Mr. Tobey: Yes. Not only that, I have checks of all this in here.

Mr. Erskine: We will come to that later.

Mr. Lasky: All right, if Mr. Tobey says so with this before [699] him, I will stipulate that for the items—I suggest you just put a bracket opposite those items on your list—we'll stipulate that the items so bracketed are Lofendo items without prejudice to your contention that the rest are also Lofendo items.

Mr. Erskine: Yes.

The Court: Very well.

Mr. Erskine: Will you indicate that on the list in an appropriate way, and I will call it to the Court's attention when it is done.

We had the other day the customer's ledger sheets presenting the commerical of the United Produce Company with the Merchandise National Bank and we had checks on both sides marked in red. I'm wondering, counsel, if you will stipulate to that?

Mr. Lasky: We discussed that the other day. I couldn't stipulate to that, because I don't think

there is any way you could determine those are Lofendo items.

Mr. Erskine: Then, I think later on in the morning I will put Mr. Tobey on and ask him to testify with respect as to how these exhibits were prepared. Then I will offer them.

Mr. Lasky: You won't even need to do that. If Mr. Tobey will tell me how he prepared them, I will stipulate that that is how he put those Red lines through, but I don't think the inference may flow from that they are Lofendo checks.

Mr. Erskine: Pay attention to this now, Mr. Tobey, and correct me if I am incorrect. So far as the debit items are [700] concerned on the sheets, the commerical ledger sheets just mentioned, Mr. Tobey examined the microfilm exhibit 1 for identification on the taking of the Messenger deposition, which showed the face and back of each checks charged against the account, showed as a picture, showed as a picture of each check, and he found that the items marked in Red on these sheets on the debit side were checks drawn by the United Produce to the order of Lofendo, and upon that basis he would state if he testified that the checks on the debit side marked in Red were such checks. And Mr. Lasky has stipulated that he has so testified.

The Court: Very well.

Mr. Erskine: So far as the credit items are concerned on these ledger sheets, the same stipulation applies to them as the checks just described in Defendant's Exhibit OO. We have certain of those cancelled checks that were in the hands of

the East Bakersfield Branch of the Bank of America at the end of November of 1948, checks drawn by Lofendo to the order of United Produce Company. We have those checks, and, therefore on the basis of those checks we can show that the checks on the credit side of the ledger sheet marked in Red were the checks drawn by Lofendo to the order of United Produce Company, so far as those checks just mentioned are concerned. Then, so far as other checks on the credit side are concerned, Mr. Tobey would testify if he were called as a witness that he checked the checks on the [701] credit side of the United Produce Company Commerical Account with the Merchandise National Bank against the list of checks shown on the Gassman list which has just been introduced in evidence in this case and marked Plaintiff's exhibit 29. Which shows on one side the checks of Lofendo drawn to the order of United Produce Company. Those checks are the checks on the right hand column headed with the words "Checks issued." Mr. Tobey checked the items appearing on the ledger sheets of the Merchandise National Bank and the United Produce Company account with the Merchandise National Bank against such checks, the checks listed in the Gassman list Defendant's Exhibit 29, for the purpose of identifying the checks marked in Red on the Exhibit which I am about to offer on the credit side of the ledger sheets as the checks drawn by Lofendo to the order of United Produce Company. He also checked such checks

against the ledger sheet of the Commerical Account of Lofendo with the Bank of America, and he found that the amount of the items marked in Red in the sheets in which I am about to offer were the same in amount as the amount of the checks debited against the Lofendo account in the East Bakersfield Branch of the Bank of America, and that that the dates correspond, with this exception: that the dates of the checks in the exhibit which I am about to offer on the credit side of the ledger sheet of the United Produce Company with the Merchandise Bank, were two or three days prior to the debit entry of the item in the same [702] amount appearing on the ledger sheets of the Lofendo account with the Bank of America. And upon the basis of the checks themselves, the—November checks we call them—and on the basis of the Gassman list, and on the basis of the ledger sheets of the Lofendo account with the Bank of America, used in the way I have attempted to describe he made the Red marks on the ledger sheets in the Exhibits which I am now offering and which I will ask the Clerk to mark.

Mr. Lasky: The last lengthy statement, of course, requires no stipulation whatsoever, because counsel has merely said that there is already in evidence a series of documents of one kind and another, and that the witness by comparing them found similarities on dates and amounts and that so and so is true. That is merely a statement of what is already in evidence, so I don't see that anything need be stipulated about it.

As for the document itself, in view of the fact that when counsel first referred to it in chambers, the objection was not reported, I would like to renew my objection not only that it is immaterial because the counterclaims are material in this case and should be stricken, but even with respect to those counterclaims it is wholly immaterial because it shows nothing whatever except that there were checks from Lofendo going into the United Produce Account and checks from the United Produce Company going into the Lofendo account, which is already in evidence. [703]

Mr. Erskine: I would like to have the details of the situation in evidence, your Honor, therefore I ask that the paper be accepted.

The Court: Very well; it is admitted subject to the ruling of the Court on Plaintiff's objection.

The Clerk: Defendant's Exhibit PP.

Mr. Erskine: Would you mind giving me Defendant's Exhibits? I want to make sure that the ledger sheet of the Lofendo Account with the East Bakersfield Branch is in evidence. I am positive it is, but I want to make sure.

The Clerk: The ledger sheet of the East Bakersfield Branch?

Mr. Erskine: That is one. Are there other sheets of similar nature?

The Clerk: There is another sheet similar to that.

Mr. Erskine: Exactly similar. It was my impression that they have gone in.

In the statement that I just made with respect

to the Lofendo Account with the East Bakersfield Branch, the ledger sheets of that account, I shall refer to Defendant's Exhibit C already in evidence, plus Defendant's Exhibit C-1 already in evidence.

The Court: All right.

Mr. Erskine: Mr. Tobey calls to my attention that in my statement I made this error: That I said that the corresponding item appeared in the ledger sheet of the Lofendo account prior [704] to the items appearing in the United Produce Company account. My statement should have been that it was subsequent, not prior.

The Court: I think that is what your statement was, as I recall it.

Mr. Erskine: I thought it was, too, but he mentioned it the other way.

The other day we had a talk, if the Court please, with respect to the schedule prepared by Mr. Tobey which I will now show Mr. Lasky. I would like this to go in with the columns which are headed, "Less Float on Deposits" and "Net Collateral Balances" stricken out.

Mr. Lasky: Hasn't this just been superceded by an exhibit we agreed to not over fifteen minutes ago? I thought that was what the other thing was, to take the place of this.

Mr. Erskine: Perhaps that is so. May I have a talk with Mr. Tobey?

I wonder, Mr. Lasky, if I could have the original ledger sheets of the United Produce Company Account with the Merchandise National Bank. Could I see those a minute?

Mr. Lasky: Of course you can, although you have got photostats of them here in evidence twice.

Mr. Erskine: Yes; the photostats, however, do not show the red figures, at least they don't to my eyes.

Mr. Lasky: All right. That's right. I am reminded that the Plaintiff Bank—you will recall it's a record of that [705] ledger consists of a microfilm of the statement which went to the United Produce Company and the original thereof is in the possession of the Trustee in Bankruptcy, so when we gave you the microfilm we gave you everything we have on that.

Mr. Erskine: Except back in Chicago we introduced these sheets. I think it was 20 and 21.

Mr. Lasky: Which you got from the—

Mr. Erskine: Trustee in Bankruptcy.

Mr. Lasky: Yes. I suppose he has them; we haven't.

Mr. Erskine: They are in the Messenger Exhibits there. I wonder if we could have them opened.

The Court: Very well, they may be opened.

Mr. Erskine: Mr. Messenger's Exhibits.

The Clerk: There are four of them.

Mr. Erskine: The beginning. Do they specify the beginning?

Mr. Lasky: To go off the record long enough to inquire, what is the purpose of counsel's present endeavors? I heard something whispered about noonday overdraft here. I don't know why that is

relevant. The noonday overdraft doesn't relate to the Defendant's situation.

Mr. Erskine: It has relevancy, I believe, your Honor, which I attempted to outline in the opening statement, which I will point out to the Court later on.

Mr. Lasky: We have already stipulated to some exhibits that have gone in that will show what we call the adjusted [706] balance for the day.

The Court: Well, I don't know what it is for—

Mr. Erskine: I will pass to something else.

I mentioned the other day that I would like a stipulation in order to eliminate certain exhibits, to the effect that the amount of drafts discounted by the Merchandise Bank for United Produce Company on each day from, let us say—the amount of outstanding drafts unpaid on each day during the period from July 1, to November 17, discounted by the Merchandise National Bank for United Produce Company exceeded the sum of \$200,000.

Mr. Lasky: Well, when we were in chambers on Saturday you confined yourself to the period October 1st and subsequently, and I checked that and I am prepared to give you the stipulation and now do give you the stipulation on every day after October 1st to November 16, 1948, the amount of outstanding drafts of the type you have referred to was \$200,000 or more.

Mr. Erskine: That will be satisfactory, your Honor.

The Court: Very well.

Mr. Erskine: Outstanding drafts unpaid, is that right?

Mr. Lasky: Yes. At that time you also agreed if we went into the subject of drafts you would stipulate that the number of drafts discounted by Plaintiff's Bank for United Produce Company in the months of August, July and September was 544 separate drafts of which five hundred and thirty-five were paid within the usual period of two to three weeks; that the remaining [707] 9 were recalled and others substituted in their place; that in the month of October 161 drafts were drawn and that only one draft was returned unpaid in October, another being substituted.

Mr. Erskine: Yes.

The Court: Very well. [707-A]

Mr. Erskine: If Mr. Lasky says those are the facts, I will accept that statement. We haven't checked it, but I will accept it and so stipulate.

The Court: Very well.

Mr. Lasky: Somewheres, Mr. Erskine, I suggest that we take up the stipulations the reporter got into rough notes, on Friday and give them to the reporter to copy into the record, because the reporter hasn't yet put them into the record.

Mr. Erskine: All right. Would you let me go along with the things I have got on my sheets and then we will come to that.

There was some discussion in chambers the other day to the effect that the obligation, what I call the net obligation of the United Produce Company to the Merchandise National Bank under notes exe-

cuted by the United Produce Company to the bank was maintained at \$200,000 dollars from the time—we can make it October 1st down to November 18th; is that right?

Mr. Lasky: I think we concluded that whatever you were driving at was covered by stipulations. I don't have those at my fingertips now.

The Court: The point is just making is of the \$200,000 line of credit you are referring to?

Mr. Erskine: That is right.

The Court: I think that is in some way, but can't you—

Mr. Lasky: I think this is true: That at the end [708] month, which would be about the 5th of the next month, when new notes were executed, the new notes would always bring the total obligation outstanding on notes up to \$200,000.

Mr. Erskine: Well, the line of credit was maintained at \$200,000.

Mr. Lasky: It is not true that each and every day it was up to the \$200,000, but when the end of the month came and they had the monthly assignments and the monthly note, that did bring it back to \$200,000.

Mr. Erskine: Well, that isn't my understanding.

Mr. Lasky: I don't think it is a fact that it was true of each and every day.

The Court: Was it ever less than \$200,000?

Mr. Lasky: Yes; never more.

Mr. Erskine: My understanding was that if you applied the payments in the suspense account, the

payments recorded in the suspense account on account of the outstanding notes on any particular day, the difference was \$200,000. That represented the difference between the payments received on account of accounts receivable and the total notes outstanding, and that it was maintained constantly at \$200,000.

Mr. Lasky: It is not a fact, as I understand it, that each time remittances were brought in, checks, new notes were executed in an equal amount.

Mr. Erskine: Well, that is my understanding. However—— [709]

Mr. Lasky: That isn't the evidence.

Mr. Erskine: However, if it can't be stipulated to, I will put in exhibits with the Messenger deposition, your Honor.

The Court: Very well.

Mr. Lasky: I am assured by Mr. Messenger, and being so assured I will be glad to stipulate to it, that while it is not true, that throughout each day the notes were up to \$200,000, by the end of each day it was brought back to \$200,000 during this period; so instead of saying it was brought back at the end of each month I will now say it was brought back at the end of each day, is that correct?

Mr. Messenger: That is correct.

Mr. Lasky: I will stipulate to that.

Mr. Erskine: That was my understanding.

The Court: Very well. It is so stipulated. And that takes care of the matter and you don't have to introduce anything further.

Mr. Erskine: In that connection, your Honor, we discussed the other day in chambers an exhibit, a summary that Mr. Tobey had prepared, and it was agreed at that time that we had all the data shown in that exhibit already in the record somewhere, except that we did not have in there the amount of the new accounts receivable loans that were being made from time to time during each month. And I would like to have it stipulated that those are the correct figures under this [710] column.

Mr. Lasky: They are not the correct figures, but I said at the time we would look into the correct figures. And I won't state it the way you have said "new accounts receivable loans." I will state by way of stipulation the fact: that the aggregate amount of new notes in the following months, exclusive of the \$200,000—

Mr. Erskine: Yes.

Mr. Lasky: —is this: July, \$946,393.90, which happens to be the same as yours; August, \$941,536.96.

Mr. Erskine: Which also happens to be the same as mine.

Mr. Lasky: Yes. September \$832,920.06, which is different.

Mr. Erskine: Yes.

Mr. Lasky: October \$1,125,054.84; November up to the breakoff date, \$1,087,046.70. I will stipulate that those are facts and object to their materiality and to their introduction in evidence.

Mr. Erskine: We had—

The Court: Do you want to stipulate to those facts?

Mrs. Erskine: Yes, your Honor.

The Court: Very well.

Mr. Erskine: I would like to carry the stipulation one step further and that is, for purposes of our own, we broke the amount of notes executed during October into two groups: those executed during the period from October 1st to October 17th [711] and those executed during the period from October 18th to October 31st, and we would like to show that difference.

Mr. Lasky: I regret that I do not have the figures available. I did not make any such breakdown.

Mr. Erskine: Perhaps then we can introduce later the ledger sheets.

The Court: What would be the purpose of that?

Mr. Erskine: The purpose would be to show that new loans were increased after October 18th after they were told they couldn't draw against uncollected funds in the commercial account they increased their loans in the note account.

Mr. Lasky: If that is what you are driving at, we entered into a stipulation on Friday that beginning toward the end of October the amount of so-called float in remittances increased.

The Court: Yes.

Mr. Erskine: That is so, with the—

Mr. Lasky: And other exhibits show that they ceased on the commercial ledger. Now I don't know how many ways he has to show it.

Mr. Erskine: Well, I will try to take care of that.

The Court: Doesn't the stipulation referred to by Mr. Lasky cover the situation?

Mr. Erskine: Your Honor, I was just discussing it with Mr. Tobey. It doesn't seem to cover. We want to get the amount of new notes executed from October 1st. Now it is true [712] that in the long statement we discussed Saturday morning, we introduced the note ledgers—part of the note ledger and part of the assigned accounts receivable, but they did not go back to October 1st. If those sheets had gone back to October 1st we would have had this information, but they did not go back to October 1st. And the stipulation with respect to the float is something else again. It is something in addition to the point we have in mind.

The Court: Do you have the ledgers then that go back to October 1st?

Mr. Erskine: Yes.

The Court: Put them in and let it go at that.

Mr. Tobey: Mr. Messenger has the original.

Mr. Erskine: Yes. Perhaps Mr. Messenger would get the note ledger going back to October 1st, from October 1st through November 17th.

Mr. Lasky: Haven't you already put the note liability sheets in back to October 1st?

Mr. Erskine: No, according to Mr. Tobey they don't go back to October 1st.

Mr. Lasky: How far back do they go? Do they go back to October 17th? From them you can get

your figures for October 17th and offer it in evidence.

Mr. Erskine: All right; we will check up on exactly what we want in. [713]

The Court: The Court will stand in recess for ten minutes.

(Recess.)

Mr. Erskine: I would like a stipulation to this effect: On the photostats of the ledger sheets in the commercial account, Defendant's Exhibit PP, there are certain symbols following the figure in the farthest right-hand column; it is either a star or a circle. I would like to have a stipulation that those symbols mean this: if it is a star, it is a black balance; if it is a circle, it is a noonday balance.

Mr. Lasky: Frankly, I am unable to tell by looking at those photostats whether they are stars or circles or what. They are just black smears to me.

The Court: Let me see the exhibit.

Mr. Lasky: It is a fact that an asterisk will follow a balance which is a black balance. It is not true that there is any such thing as a circle.

Mr. Erskine: I mean it is the letters "o.d."

Mr. Lasky: Oh, "o.d."; that is true. I don't think you will be able to detect that by looking at those photostats.

Mr. Erskine: It is true that those are difficult, but there is another—

The Court: Where are the "o.d.'s"? I don't see any on there.

Mr. Erskine: We have a much clearer exhibit here, your Honor. You might glance at that. [714]

The Court: Oh, yes.

Mr. Erskine: This is much clearer than the other. This photostat was blown up back in Chicago.

I was just referring, if the Court please, to the symbols appearing upon the ledger sheets of the United Produce Company's commercial account. The star represents a black balance, as I said, and the initials "o.d." represent an overdraft—not a true overdraft, but a noonday overdraft. I ask counsel if he will stipulate that that is a fact.

Mr. Lasky: Yes, I will stipulate to those facts, and again I object to the materiality, because it has no relation even to these counterclaims. It has no more relevance if there was an apparent overdraft at noon, than if there was an overdraft at ten o'clock or eleven o'clock; it is just an interim figure.

Mr. Erskine: That is a matter of argument, your Honor.

The Court: Very well; upon the stipulation it may be marked and admitted in evidence, subject of course to the objection of counsel.

Mr. Erskine: I will offer in evidence another photostat of the ledger sheets of the commercial of the United Produce Company with the Merchandise Bank and ask that they be marked Defendant's exhibit next in order.

The Clerk: Defendant's Exhibit QQ in evidence.

Mr. Erskine: During the recess, your Honor, I spoke to Mr. Tobey about this business of whether or not we had the note liability ledger in evidence

for half of the month of October [715] together with the assigned accounts receivable ledger for half of the month of October, and he called it to my attention that we haven't got those sheets in evidence for half of the month; that the sheets in evidence in connection with the stipulation, Defendant's Exhibit NN, begin with—what was the date? About the 20th?

Mr. Tobey: Yes, about the 25th.

Mr. Erskine: About the 25th of October. So I would like to introduce at this time the sheets of the note liability ledger which I am now showing to counsel, which begin as September 29th.

Mr. Lasky: What are you asking?

Mr. Erskine: I would like to introduce those in evidence and part of the sheets that were introduced in evidence when we were discussing the stipulation Defendant's Exhibit NN but to be given a separate number.

Mr. Lasky: I will agree that these are true copies of what they purport to be.

The Court: Of the notes liability ledger.

Mr. Lasky: I object to that admission upon all the grounds heretofore stated and upon the further ground that it is immaterial.

The Court: Very well. Upon the stipulation they are admitted, subject of course to the Court's ruling upon the objection. [716]

The Clerk: Defendant's Exhibit RR.

Mr. Erskine: Also for the same reason I would like to put in evidence these three sheets of the assigned accounts receivable ledger.

Mr. Lasky: I will agree that these copies are true copies of what they purport to be, make the same objection as before, and the further objection that these things so far as I can comprehend have no relevance for the present purpose for which counsel seems to be offering them, namely bearing upon the new notes issued and taken.

The Court: They be marked and received in evidence, subject to the Plaintiff's objection, and the ruling of the Court thereon.

The Clerk: Defendant's Exhibit SS in evidence.

Mr. Erskine: I think there is only one more thing before I come to the depositions, your Honor, and that is this: that in view of the discussion that took place the other day with respect to Mr. Tobey's report and certain checks referred to therein, I would like to offer in evidence these six checks of Lofendo.

Mr. Lasky: I don't know what this is supposed to represent. Mr. Tobey's report was not offered in evidence.

Mr. Erskine: No, but I mean the discussion with respect to it and the stipulation based on it. That was discussed in chambers. [717]

The Court: Does the stipulation have any reference to these checks?

Mr. Erskine: Yes, your Honor.

Mr. Lasky: What are these checks?

Mr. Erskine: As I understand them—Mr. Tobey can correct me if I am wrong in this—those are the three checks that we originally described as the

checks lying around the bank. I think that will identify them.

Mr. Tobey: Three of them are the checks that were lying around.

Mr. Erskine: We do not stipulate; I am just using that term.

Mr. Tobey: The other three checks are the \$109,000 that was charged against the \$97,000.

Mr. Lasky: The evidence shows that on a certain date the bank honored checks for \$109,000, and on another day they honored checks for \$75,000.

Mr. Erskine: Yes.

Mr. Lasky: That is the fact. How the paper helps us, I don't know.

The Court: How are the particular checks going to help?

Mr. Erskine: I don't know if they do.

Mr. Lasky: I would suggest that Mr. Erskine and not Mr. Tobey advise us.

Mr. Erskine: It is material under one of our defenses. [718] We plead an estoppel in our counter-claim, and Mr. Tobey calls my attention to the fact that we did should show that those particular checks are payable to the United Produce Company.

The Court: You can so stipulate if that is what they do show.

Mr. Lasky: Which are the \$109,000?

Mr. Erskine: Which are the 109?

Mr. Tobey: These three are the 109 (indicating); these three are the 75 (indicating).

Mr. Lasky: All right.

Mr. Erskine: One of these is to Feldbaum.

Mr. Lasky: I know one of them is to Feldbaum. As a fact, I so stipulate, and do stipulate that each of the three checks totalling \$109,000 was a check payable to the United Produce Company, and I object to the materiality of that.

The Court: Very well.

Mr. Lasky: As for checks totalling \$75,000 which we have heretofore referred to as laying around or kicking around the branch from the 15th to the 18th of November—

Mr. Erskine: Without prejudice, your Honor.

Mr. Lasky: Without prejudice, although I think it is a very apt description, two of them were payable to United Produce Company, one was not. One was payable to another party.

The Court: Very well.

Mr. Lasky: I stipulate to the fact with the same objection. [719]

The Court: Yes.

Mr. Lasky: The one payable to the other party was for \$23,724.50.

Mr. Erskine: That is all, your Honor, except the depositions, and if I could just run through them as fast as I can, portions of them—

Mr. Lasky: Before you get into the depositions, don't you think we ought to clean up the rough draft of stipulations of Friday?

Mr. Erskine: All right, have you got an extra copy?

Mr. Lasky: No, the reporter handed me one of them, and I guess he handed you a copy.

Mr. Erskine: Let me read yours.

Mr. Lasky: All right.

Mr. Erskine: Here they are.

Mr. Lasky: I suggest that we fix them up, hand them to the reporter and have him just rough it in in corrected form.

This may go in the record: that in the stipulation where it is said that plaintiff made objections to the materiality, the Court reserved the ruling, the record should show that the statement with respect to the Court's reservation of the ruling is by the Court and not by counsel. We wouldn't want to stipulate to that.

The Court: Yes.

Mr. Erskine: Yes, certainly; that is right. [720]

Mr. Lasky: I would like to say this for the record—

Mr. Erskine: If the Court please, we are just reading that part of the stipulation with respect to the float on the checks received on accounts receivable. It says that it increased more or less steadily until November 16, 1948, and that on November 15th it was \$602,535. I would like, in order to indicate meant, I would like to state as a part of the stipulation what the float was as of, let us say October 20th, or any date in there, so as to show the amount of increase.

Mr. Lasky: We concluded after discussing it the other day that it would serve counsel's purpose by saying it increased more or less steadily. If we have to going to have the figure of October 20th—and I haven't the faintest idea of what it was on that date—then I would say we would to have it

for every day. We have got the record spread out again.

The Court: I should think so, counsel. Surely the Court understands what you are doing.

Mr. Erskine: Yes.

The Court: And what the whole picture was of this increase. Now that it amounted to any particular figure at any particular time is not of any help in deciding any of the questions, as far as I can see. I think your stipulation covers everything that is necessary, and, as counsel points out, if you pick out one day, then of course that is different than it was on any other day, so you have to show every day. [721]

Mr. Erskine: All right, your Honor.

Mr. Lasky: Then I will just hand it to the reporter.

Mr. Erskine: Have we finished reading it?

Mr. Lasky: I have, I don't know whether you have. [721-A]

Mr. Lasky: I will just hand this to the reporter. Counsel is editing his own statements there. Of course that is no concern of mine at all. I will hand this to the reporter and request that he incorporate it into the record and down to the point where the name "Mr. Erskine" appears and state that it represents a stipulation of the parties.

The Court: Very well.

Mr. Lasky: Except to the extent where it refers to the Court reserving rulings on objections, that represents the Court.

The Court: Very well.

(The following is a copy of a stipulation referred to.)

"It may be deemed that the whole of the deposition of Sam Gassman (minus the exhibits) taken in Chicago, Illinois, on behalf of the defendant on December 15, 1949, has been placed in evidence by defendant and marked Defendant's Exhibit W in this trial.

"And with that as a predicate, we will stipulate that the paper entitled "Summary of pre-season advances and repayments as shown by cash disbursements books and by cash receipts book of the United Produce Company," marked as Defendant's Exhibit X in this trial, is a correct transcription of what it purports to transcribe from certain books identified in that Gassman deposition as Gassman's exhibits 3A to 3III and 1A to 1AAA, subject to plaintiff's objection as to its materiality, the [722] Court reserving its ruling at this point.

"It is here stipulated that the photostatic copies of the following books of United Produce Company may be marked as follows:

"Cash receipts book—Defendant's Exhibit Y,

"Accounts receivable ledger—Defendant's Exhibit Z,

"Cash disbursements book—Defendant's Exhibit AA,

subject to plaintiff's objection as to materiality and remoteness, the Court reserving its ruling at this point. It is also

"Stipulated that the five folders of documents

presented by Mr. Lasky constitute the daily remittance sheets delivered by United Produce Company to the Merchandise National Bank accompanying checks through the months of July, August, September, October and November, 1948, and subject to plaintiff's objection as to materiality and remoteness, the Court reserving the ruling thereon, may be marked as follows:

“July—Defendant’s Exhibit BB,
“August—Defendant’s Exhibit CC,
“September—Defendant’s Exhibit DD,
“October—Defendant’s Exhibit EE,
“November—Defendant’s Exhibit FF.

“It is stipulated that the schedules marked Defendant’s Exhibit GG, consisting of three pages are a correct transcription of certain date from certain schedules which accompanied and were a part of the interim and monthly assignments of accounts receivable made by United Produce Company [723] to Merchandise National Bank during the months of September, October, and November, 1948, Mr. Lasky stipulating to the fact but objecting to the materiality of the fact and of the schedule the Court reserving its ruling on plaintiff’s objection.

“Plaintiff’s Exhibit 6 is typical of the form of monthly assignments referred to in the foregoing stipulation and referred to Defendant’s Exhibit GG.

“It is stipulated that beginning on or about the 29th of October, 1948, the amount of float with respect to checks of Lofendo drawn on the East Bakersfield branch remitted to plaintiff bank by

United Produce Company on the assigned accounts receivable operations began to increase, and increased more or less steadily until November 16th, 1948, and that on November 15th it was \$602,535.61. This float is calculated on the basis of checks not in fact then yet collected of which amount \$583,743.15 were never good.

“Float” in banking parlance means the dollar amount of checks upon which a bank gives conditional credit during the period of time that they are not yet actually collected, with this exception: That when they are sent through for collection on a cash letter, they are assumed to be paid after a given period of time, and that in the case of checks which Merchandise National Bank sent by cash letter to the East Bakersfield branch of the Bank of America for payment, the period of time for this purpose was [724] treated by Merchandise National Bank as four days.

“Mr. Erskine: I would like to state this for the record: It has been suggested by the defendant from time to time during the discussions of this afternoon that it produce summaries of the data shown by the exhibits which have been introduced in evidence, but the suggestion was then made that what would be shown by such summaries appears in the exhibits already in evidence, and that therefore there is not need of introducing such summaries in evidence, and that the defendant in its argument could use any summaries it saw fit based on such exhibits.

“Mr. Erskine: I will ask that the paper that I am now handing to the Clerk to be marked as

Defendant's Exhibit C-1, the paper being the sheets of the Lofendo account with the East Bakersfield branch from the date upon which the account was opened to the date shown on the last two ledger sheets of the account already introduced in evidence.

"(The document referred to was thereupon received in evidence and marked Defendant's Exhibit C-1.)"

Mr. Erskine: That leaves us nothing but the depositions, your Honor. Shall I try to proceed with them?

The Court: You are referring now to Mr. Messenger's deposition, the parts that you want to introduce? [725]

Mr. Erskine: Yes, your Honor.

The Court: If you have a list of them, all you have to do is to read the list.

Mr. Erskine: I can read the pages. I have tried to eliminate as much as I possibly could in view of the stipulations and in view of the exhibits that have already gone into evidence, I could read the pages.

The Court: Yes, just read the pages and they will be taken down by the reporter.

Mr. Lasky: Of course it makes it exceedingly difficult for me to know whether I should make an objection to parts as they come in. I think the only thing I can do under the circumstances is to object to all parts as being immaterial.

The Court: They will all go in under your general objections on the whole matter, Mr. Lasky.

Mr. Erskine: Then I offer in evidence the following pages of the Messenger deposition.

I would like to be somewhat clear as to the mechanics. I take it that the reporter will copy the pages of the Messenger deposition which I am about to cite in the record.

The Court: Into the record, yes.

Mr. Lasky: Of course that is all right. I merely want to state that I don't want a daily transcript of this portion written up and delivered to us.

Mr. Erskine: Neither do I. That can be prepared later. [726]

The Court: Very well.

Mr. Erskine: The pages to which I refer are:

Pages 63 to and including 65;

Pages 74 to and including 75;

Pages 77 to and including 78;

Pages 249 to and including 252.

Mr. Lasky: That was all discussed between counsel.

Mr. Erskine: Yes, I take that out. Take that out.

Page 277 to page 293.

And I would like to have marked as an exhibit the exhibit that was marked upon the taking of the Messenger deposition Exhibit 25.

Mr. Lasky: We discussed that in chambers, when we drew up the long stipulation and it was agreed that you didn't need it because it referred to the procedure of handling loans and that would cover it.

The Court: That is right. I don't know as we agreed we didn't need it. It is already covered.

Mr. Erskine: Part of it is covered. The part

relating to the loan is covered, but the balance isn't.

Mr. Lasky: What is the balance of it?

Mr. Erskine: It might be material. It relates—

The Court: I know. If it just might be, can't we eliminate it, Mr. Erskine. We started out pretty good there but we were going to eliminate all these records. It is piling up, piling up [727] now to much more than was ever necessary.

Mr. Lasky: I think so.

The Court: Unless you have something definite in view with it, let's eliminate it. Just because it might be of some value—the matter is covered generally.

Mr. Erskine: It shows the relationship—

The Court: That is no contest.

Mr. Erskine: Counsel has introduced evidence to show the relationship between the bank, the contractual relationship between the bank and the United Produce Company. This exhibit 25 is an outline of how the account is to be handled.

Mr. Lasky: Drawn up in 1945. Now we have a stipulation as to how it was handled.

The Court: How it was actually handled. How would that help us.

Mr. Lasky: That memorandum was not a memorandum between the parties binding as to how the bank was to go ahead. We have stipulated how in fact the parties proceeded.

The Court: That is what governs the legal relationship, isn't it, is how they actually handled the account?

Mr. Erskine: On one phase of the matter we

have agreed on that, your Honor, but the exhibit relates to other phases of that relationship. I would like to consider the point, and if possible I will forget about it.

The Court: Very well. [728]

Mr. Erskine: That takes us to 293. Well, no, I want 293 to and including 295.

Mr. Lasky: That is just a discussion on that memorandum. I don't think it is evidence; I think is is just a question between counsel.

Mr. Erskine: It says that there was no written modification of it but there were mutual changes in it. The limit was increased from 175 to \$200,000.

Mr. Lasky: It would serve no purpose because we have already stipulated to that.

Mr. Erskine: But you see, Mr. Lasky, that memorandum relates to the amount of the line of credit and described it all. Counsel was very meticulous in putting into evidence the papers which he says represented contractual relationship between the bank and the United Produce Company. This is one of the important papers relating to that subject, your Honor, and I would like to have it in.

The Court: Very well.

Mr. Lasky: A line of credit is merely a statement by the bank that it has in mind advancing so much money; but in this case we have agreed and I have agreed just half an hour ago to the \$200,000, so the fact that they were going to do it is immaterial.

Mr. Erskine: But you put in papers relating to the contract between the bank and United. I know

you are going to discuss that in argument and I would like to have this in. [729]

The Court: Very well, put it in.

Mr. Erskine: I said 293 to and including 295.

The Court: That exhibit is Defendant's Exhibit TT in evidence.

Mr. Lasky: Did I understand that memorandum is now coming in?

Mr. Erskine: Yes.

316 to 318.

Mr. Lasky: 316 to 318 again is discussion between counsel, not evidence. You can't offer discussion between counsel.

Mr. Erskine: There evidently was something in there that I wanted in the way of evidence. I know that discussions between counsel is not evidence. Yes, I would like to have that in there. There is quite a bit more than discussion between counsel.

320 to and including 341;

362 to and including 363;

367;

370, together with the others, reports which are marked Exhibit 49 and following, on the Messenger deposition. I would like to have those marked. They relate not so much to this as to Tague's testimony.

Mr. Lasky: You mean they were the reports the field officer turned in?

Mr. Erskine: Yes. [730]

Mr. Lasky: Throughout the year 1948?

Mr. Erskine: No, not throughout the year; during the last few months. It may have been throughout the year; I don't know which it was.

Mr. Lasky: Again I object to the materiality of

these auditors reports. I am just completely lost on this materiality; it has gotten so far afield that it is hard to frame an objection any more.

Mr. Erskine: Your Honor, it is our contention that the auditor was negligent.

The Court: I am not going to take a stand at this point that would in any way make Mr. Erskine's case incomplete from his theory of the matter. As you of course have observed, I am putting in anything and everything he wishes to put in, subject to your objection as to its materiality, of course. I don't know; I don't follow its materiality, but counsel will on his memorandum point out its materiality.

Mr. Lasky: I will try to restrain myself from repeating these objections.

The Court: Yes; all of these go in subject to your objection as to materialities.

Mr. Erskine: I ask that that be marked Defendant's next in order, those audit reports.

The Clerk: This is Defendant's Exhibit UU in evidence.

Mr. Erskine: 371 to and including 372; [731] 385 to and including 415.

Mr. Lasky: Pardon me a moment. As I read this, this covers the sort of thing we went through in chambers on that long stipulation of the account. You are developing through the witness what we later stipulated to, thirty pages.

Mr. Erskine: I think I would like to have it in. I don't see that it can do any harm. At least I did when I read the deposition.

The Court: It isn't going to change the stipulation.

Mr. Erskine: No, your Honor, no, no, I am not; the stipulation controls whatever that says.

Mr. Lasky: I understand that counsel properly went through these depositions and marked the parts before the trial opened.

Mr. Erskine: I have been over them since then. I went over them yesterday.

The Court: Very well; proceed.

Mr. Erskine: Pages 424 to and including 426; 460—

Mr. Lasky: 424 to 426 is the part where for the first time the Plaintiff's Capital Stock and surplus is stated.

Mr. Erskine: Yes, that is right.

Mr. Lasky: That of course relates to your point about the excess loans in violation of the bank law. [732]

Mr. Erskine: Yes.

Mr. Lasky: I wanted to make sure of the point.

The Court: You object specifically?

Mr. Lasky: Yes.

The Court: And the objection is taken from the advisement by the Court and ruling reserved on it.

Mr. Erskine: 460 to 465.

There was a stipulation between us, Mr. Lasky—

Mr. Lasky: Pardon me?

Mr. Erskine: There was a stipulation between us with respect to the Bankruptcy claim. In introducing part of the Reichwine deposition, I will want to use two or three of the exhibits that are in the

Bankruptey claim, and we stipulated back in Chicago that the photostats could be used in place of the originals.

Mr. Lasky: Reference here of course is to the claim which the Merchandise National Bank filed with the Trustee in Bankruptey of United Produce Company. Counsel brought it out and we did stipulate and I stipulate again, that all photostatic copies attached as exhibits to that document may be deemed as originals and used as such for all purposes of the case. I so stipulate.

Mr. Erskine: Page 475, and I would like to introduce Exhibit 64, which is the report of overdrafts.

The Court: Isn't that all in here now, or is it just a [733] summary?

Mr. Erskine: No, it is just a formal report.

Mr. Lasky: Is it just nothing.

Mr. Erskine: It was a formal report that was explained in the depositions. It relates to the overdrafts on the amount.

Mr. Lasky: It isn't even that, counsel.

Mr. Erskine: Well, the form, taken with the deposition, explains how a report was made to the bank officers, with respect to overdrafts whenever the overdrafts appeared, and how often the overdrafts appeared in a particular account.

Mr. Lasky: It is a form by which at the end of the day the bank got the report as to any apparent noonday overdrafts, how they were handled, whether there were other items coming in throughout the day which showed that there wasn't an over-

draft. This was just a form used by the bank for that purpose. [734]

The Court: What is the purpose of it?

Mr. Erskine: The purpose of it is to show that there were many noonday overdrafts in this account.

The Court: That appears from the evidence already.

Mr. Erskine: Whenever that noonday draft so appeared, a report to that effect was made to the bank officer, together with the checks creating the overdraft, and calling his attention, according to our point of view, to the situation in the account.

The Court: They knew about the account. If the bank's records show it, it is knowledge to the bank.

Mr. Erskine: Let's forget about that then.

The Court: Gentlemen, I am sorry I have to leave at this point. I have an appointment. I would like to continue right straight through and see how much we can eliminate or get settled.

Mr. Erskine: Yes.

The Court: The Court will stand in recess until two o'clock.

You had better make arrangements to have the Court meet in some other courtroom; they want to use this room starting at three o'clock.

Mr. Erskine: We will be through.

Mr. Lasky: I am not so sure.

The Court: I am not so sure. [735]

Mr. Lasky: I have a very short rebuttal. It all takes a little time.

The Court: You can make arrangements for us

to use another courtroom at two o'clock. Counsel can check with the Clerk's office to find out which one.

(Thereupon a recess was taken until two o'clock p.m.) [736]

Monday, June 26, 1950, at 2 P.M.

Mr. Erskine: Now the next pages of this Messenger deposition which I would like to offer are pages 497 to and including 499. Then page 530—

Mr. Lasky: Just a little more slowly.

Mr. Erskine: Then pages—ready?

Mr. Lasky: All right.

Mr. Erskine: Then pages 530 to 537. Then pages 541 to 545. Exhibit 11, or the checks marked for identification as Exhibit 11 on the Messenger deposition are the same checks as were marked Plaintiff's Exhibit 4 for identification in the trial.

Mr. Lasky: That is right.

The Court: Very well.

Mr. Erskine: Then pages 546 to and including 549. Then there was a stipulation, Mr. Lasky, between us back in Chicago with respect to the form of the note. I don't know that that is necessary, but—

Mr. Lasky: The note?

Mr. Erskine: You remember.

Mr. Lasky: I think I put that in earlier, in my case.

Mr. Erskine: Yes, you put that in. I don't think it is necessary.

Mr. Lasky: It isn't necessary to put it in [737] again.

Mr. Erskine: Well, no. There was a stipulation between us back in Chicago with respect to the form of the note, if you remember, and then later on you wanted to modify that stipulation with respect to the form of the note, and the modification appears here in 565 to 572. But I don't believe it is important.

Mr. Lasky: Oh, on that part of it, I had copied out that and it is in one of my exhibits.

The Court: It is part of the exhibit that is in evidence?

Mr. Erskine: Oh, I see, I see. I didn't realize that.

Mr. Lasky: It is already in.

Mr. Erskine: Then pages 573 to and including 574; 585 to and including 588.

Mr. Lasky: Well, now, 573 to 574 concerns Mr. Messenger's state of mind.

Mr. Erskine: Well, let me look at it. Perhaps I can pick it out. Yes. Well, I will take that out.

The Court: All right.

Mr. Erskine: Then the last is from 585 to and including 588. And if I should have left out the word "including" when referring to the last page, I want it understood that in saying what I did, I meant "including" when referring to the last page of each one of these citations.

The Court: Very well.

Mr. Erskine: And now going to the Collins

deposition, your [738] Honor, I would like to offer in evidence pages 3 to 15 of that deposition.

Mr. Lasky: Will you pardon me while I get Collins before me? Well, without repeating the general objection, on page 14 the witness was asked whether he talked to any other officer of the bank. He said, "Oh, I am quite sure that I did." And then he went on to say, "A thing like that was almost bound to be a matter of somewhat general discussion," and that part I move to strike. He goes on to say, "I know that a thing like that was almost bound to be a matter of somewhat general discussion among the officers who would be working in any manner on the account or servicing it in any manner. I know that at that time that was first called to Mr. Redheffer's attention by Mr. LeRoy and myself. He called Mr. Rudolph in and I think Mr. Rhodes, and there was a general discussion." None of that is responsive to the question and none of it is within his knowledge. I think that should go out.

Mr. Erskine: I can't agree, your Honor, as to this question of whether or not Collins had called it to the attention of the officers of the bank, the fact that a kite might be going on.

The Court: Well, his answer then is just, "Well, it must have been because it must have been a matter of general discussion," or words to that effect.

Mr. Lasky: Yes. I mean, he says, "I am quite sure that [739] I did." I don't move to strike that out. That is responsive. But the rest of the answer, which goes over to the top of page 15, I do move to strike, because that is his speculation, that a thing

like that would have been bound to have been discussed.

The Court: Yes.

Mr. Erskine: Well, the language, "A thing like that was almost bound to be a matter of somewhat general discussion among the officers who were working in any manner on the account or servicing it in any manner"; I agree that that should go out.

The Court: Very well, that motion may be granted, that portion may be stricken.

Mr. Lasky: All right.

Mr. Erskine: Now we come to the Reichwine deposition.

Mr. Lasky: Well, before you get further than Collins, I offer part of the cross-examination of Collins. I do so only because the rest of it has come in. I offer his cross-examination, pages 33, line 6, to page 35, line 2; page 41, line 15, to page 42, line 19; page 44, the last two lines, to and including the 9th line on page 45; page 48, lines 3 to 16; page 56, beginning at the second line from the bottom, to page 58, the next to the last line from the bottom.

The Court: Very well.

Mr. Erskine: Now we come to the Reichwine deposition, your Honor, and I would like to offer pages 3 to and including [740] 18.

Mr. Lasky: Will you take this a little slowly for me?

Mr. Erskine: Yes.

The Court: Three to and including 18.

Mr. Erskine: Yes, your Honor.

Mr. Lasky: Now, just a moment, please. I am

not going to repeat the general objection, but there may be specific matters. On page 13, which is part of what you just offered, and over on page 14, is a series of questions whether the line of credit being extended to United Produce Company was as large as any line of credit extended to any other customers. I object to that. That is particularly immaterial.

Mr. Erskine: Well, I will agree that may go out.

The Court: That portion may be stricken.

Mr. Erskine: Then pages 18 to and including 20. Now in that discussion, or in that testimony, your Honor, there was a reference to certain delivery orders and drafts and invoices attached to the bankruptcy claim, and I would like to suggest that we have one of those, as an exemplar, marked as an exhibit.

(Document examined by Mr. Lasky.)

Mr. Erskine: I will ask for a stipulation that—Would you mark that, Mr. Clerk, first, please? Mark it for identification.

The Clerk: This will be defendant's Exhibit next in order, Defendant's Exhibit VV for identification. [741]

(Exemplar of documents attached to bankruptcy claim, referred to above, was marked Defendant's Exhibit VV for identification only.)

Mr. Erskine: We ask it be marked in evidence. I think I am going to try to put it in evidence, and I don't think there will be any objection.

Mr. Lasky: Well, there will be, of course.

Mr. Erskine: Well, subject to your general objection. It will be stipulated, Mr. Lasky, that the drafts discounted by the United Produce Company with the Merchandise Bank were in the form of the drafts on this Exhibit VV, and that the form of delivery order and invoice accompanying drafts discounted by United Produce Company with the Merchandise Bank were in the forms of the delivery order and the invoice on this exhibit.

Mr. Lasky: It will be stipulated that the various drafts were in the general form of the draft here photostated, that each such draft when brought to the bank and discounted was accompanied by an invoice purporting to cover certain sales and carloads and railroad cars of goods. The invoice being in the general form here set forth. And it was also accompanied by certain delivery order in the form set forth herein. That is the fact; I object to the whole thing as immaterial. This bears upon the question of excess loan limits.

The Court: Very well, it is admitted subject to the ruling of the Court on plaintiff's [742] objection.

The Clerk: Defendant's VV.

(Whereupon Defendant's Exhibit VV for identification only was received in evidence.)

Mr. Erskine: Then on pages 38 to 41 of this deposition is set out the stipulation with regard to what constitutes noonday balance, and I would like to have that copied into the record as a stipulation in the case.

Mr. Lasky: Well, if it goes in one way, it doesn't need to go in another way.

Mr. Erskine: Well, all right.

Mr. Lasky: We will stipulate to it.

Mr. Erskine: Then it is stipulated on the trial as well as on the taking of the deposition? I assume that if you stipulate to it upon taking of the deposition, it will probably be stipulated to on the trial.

Mr. Lasky: Yes, of course.

Mr. Erskine: Yes, all right. Then we will say pages 38 to and including 41 of the deposition.

Mr. Lasky: You will find that that stipulation was supplemented in the record a little later.

Mr. Erskine: Yes. And in connection with that same stipulation, your Honor, I want pages 49 to and including 54.

Mr. Lasky: I think you had better start on page 47.

Mr. Erskine: Forty-seven? All right; 47 to and including 54. [743]

The Court: That is also part of the stipulation?

Mr. Lasky: Yes, part of the same stipulation.

The Court: Very well.

Mr. Erskine: Part of the same stipulation. Then to go along, here—

Mr. Lasky: Stipulation subject to my same general running objection.

The Court: Yes.

Mr. Erskine: Page 56—pages 60 to 66. If I go too fast, let me know, will you, Mr. Lasky?

Pages 91 to 94—to and including in each case. Page 101, page 106 to 107, page 156 to and including—

Mr. Lasky: Pardon me a moment. Go ahead.

Mr. Erskine: Pages 156 to and including 161.

Mr. Lasky: What page, please?

Mr. Erskine: 158 to and including 161.

Mr. Lasky: I think you will find that has already been all covered by stipulation entered into in this case.

Mr. Erskine: Let me see.

Mr. Lasky: For instance, your first question there (reading); we covered that by a stipulation this morning. That has all been covered.

Mr. Erskine: Well, I want to get in there that it was on the same day and so forth, that additional accounts receivable would be issued. It was just three pages, and I don't [744] think it will do any harm.

The Court: Very well.

Mr. Erskine: Page 158 to and including 161, pages 166 to and including 171, page 177 to and including 178, page 181 to and including 193.

Mr. Lasky: Just a moment, please. My notes on this indicate it has already been covered by stipulation, or at least in conversation between counsel. One eighty-four in the wire of October 20th from Merchandise National Bank to Bank of America.

Mr. Erskine: Well, I want to show that it was Reichwine who sent that wire and that he was thoroughly familiar—

The Court: His name is signed to it, isn't it, and it is evidence?

Mr. Erskine: That is right.

The Court: There is not other contest on the matter?

Mr. Erskine: And the fact that when he referred to the letter for full information, it was the letter of September the 22nd that was presented to him.

Mr. Lasky: No, he said he didn't know anything about that letter. That is, unless I made a mistake.

Mr. Erskine: Yes, you are mistaken about that, because here is the question:

"Well, I call your attention to the fact that I was in error in putting the question to you. Defendant's Exhibit 2 states this. 'Suggest you contact your main branch at Fresno, California, who have complete [745] "Information,"' I will ask you, Mr. Reichwine, when you stated that in Defendant's Exhibit 2, did you have reference to Defendant's Exhibit No. 3?"

"Yes, sir."

Mr. Lasky: Where are you reading from?

Mr. Erskine: That is page 183 to 184.

Mr. Lasky: All right.

Mr. Erskine: Now, that reminds me, your Honor, that I would like to have those pages in, 181 to and including 193. Now—

Mr. Lasky: 186 to 193—or rather, 186 to 188 is just conversation between the attorneys.

Mr. Erskine: Oh, yes. Let's take that out. Let's say 181 to and including 186. I am not trying to cover lines in here. And then 188 to and including 193.

Now, your Honor, I take it, Mr. Lasky, that it will be stipulated that Exhibit 2 on the taking of

Reichwine's deposition was the wire of October the 20th? I don't know the number of it, but I think that was sufficiently identified—from Merchandise to the East Bakersfield branch of the Bank of America. And that No. 3 upon the taking of Reichwine's deposition was the letter of September 22nd, addressed by Merchandise Bank to the Fresno branch of the Bank of America?

Mr. Lasky: Yes.

The Court: Very well. [746]

Mr. Lasky: No, Mr. Erskine, from page 188 on to 193 is primarily discussion between you and me.

Mr. Erskine: 188 to 193—well, it does relate in my opinion, Mr. Lasky—I agree with you that page 190 can go out. That is all discussion.

The Court: Well, as a matter of fact, anything in the record, anything in the reported conversations or statements by either one of you can go out.

Mr. Erskine: Yes, that is right, your Honor.

The Court: Because certainly it is not evidence.

Mr. Lasky: It is not evidence of anything.

Mr. Erskine: And 191 can go out. But 192 to 193 I want in. Then the next citation is 204 to and including 209.

Mr. Lasky: Just a moment, please. All right.

Mr. Erskine: Then the next is page 222 to and including 229. And the next—you want to give me the high sign before I go on, Mr. Lasky?

Mr. Lasky: Go ahead.

Mr. Erskine: The next is 236 to 241. Next is 265, next is 271 to and including, or I should have said that in each instance, 272. The next is 276 to and

including 281. Next is 283. Next is 287 to and including 290. Next is 303 to and including 307. Next is 316 to and including 320. Next is 323 to and including 328. And the next is 329 to and including 331. Next is 335 to and including 336, and that is all for [747] Reichwine.

Mr. Lasky: I think it will be found that practically all of that is what I would call padded—discussions on matters already stipulated to and so forth. I didn't state my general objection, which I assume goes. I want to offer other parts of the deposition, without waiving my objection to any of it.

The Court: Yes.

Mr. Lasky: That is as follows: Page 85, fourth line from the bottom to the bottom of page 86; page 177, line 10 to line 15; page 214, line 22 through page 216; page 298, line 12 to and including line 20; page 311, line 7, to page 312, line 3; page 315, tenth line from the bottom through page 316.

I believe Mr. Erskine offered page 316 and following, did you not?

Mr. Erskine: My book there will show it. Pardon me. 316 to 320.

Mr. Lasky: All right. Page 321 to page 323. That is to say, to the end of this cross-examination on page 323. Then page 336, page 337. Also at this time I wish to offer in evidence the exhibit that was marked 5-B on Mr. Reichwine's deposition. Now there is a stipulation in the record on that matter. At page 33 it appears. I think I can briefly summarize it. Exhibit 5-B is part of the Merchandise

National Bank's outgoing collection forms. In other words, when they sent a draft out somewhere else for collection, they used these forms, [748] and 5-B is the form that accompanied the draft itself. Will you so stipulate?

Mr. Erskine: Yes, I will agree.

The Court: Very well.

Mr. Erskine: No objection.

The Court: Very well.

Mr. Lasky: I merely want to call attention to the fact that this collection letter has on it the instructions to deliver documents only on payment.

The Court: It will be received.

The Clerk: This is plaintiff's exhibit No. 32 in evidence.

(Whereupon collection letter referred to above was received in evidence and marked Plaintiff's Exhibit No. 32.)

Mr. Erskine: Then coming to the Tague deposition, your Honor, I would like to offer pages 4 to and including 5; pages 11 to and including 19; or to and including 18—I am sorry, I misread that. Then pages 21 to and including 34, pages 37 to and including 48, and I would like to have it agreed that the exhibit Defendant's Exhibit TT that was offered this morning is the same exhibit as Defendant's Exhibit 49-A to 49-G for identification on the taking of the Messenger deposition.

Mr. Lasky: Let me look at it (examining); all right.

The Court: Very well.

Mr. Erskine: And pages 49 to and including 60.

Mr. Lasky: Are you sure that is TT? Shouldn't it be UU? [749]

The Clerk: He had picked up both of them by error.

Mr. Erskine: Oh, I am sorry.

The Clerk: This is TT here (indicating).

Mr. Erskine: I am sorry.

The Court: Picked up both of them by error.

Mr. Erskine: The exhibit was UU and not TT.

The Court: Very well.

Mr. Erskine: Thank you, Mr. Lasky. Then 64 to and including 66, 68, and 74 to and including 75. That is all.

Mr. Lasky: You offered all of page 68?

Mr. Erskine: Yes, all of page 68.

Mr. Lasky: Without waiving my objection to any parts of Mr. Tague's deposition, and merely because it is being received subject to the objection, I wish to offer his cross-examination page 60 to line 10 on page 64, and also pages 69 and 70.

The Court: Very well.

Mr. Erskine: Now I want to offer just two sections of Royds' deposition. I would like to offer pages 4 to and including 18. There is a reference on page 9 to defendant's exhibit 44 in the Messenger deposition, the remittance sheets. I will ask that it be stipulated that that reference—

Mr. Lasky: The reference is 41, isn't it?

Mr. Erskine: Oh, 41. Yes, pardon me. Forty-one is the remittance sheet. I will ask that it be stipulated that that reference is to the remittance

sheets, and the form of those [750] introduced on the trial and marked Defendant's Exhibit BB.

Mr. Lasky: All right.

The Court: Very well.

Mr. Erskine: And then pages 24 to and including 32 of the Royds' deposition. That is all.

Mr. Lasky: Well, I have my objection, but I have nothing further to offer out of that.

The Court: Very well.

Mr. Erskine: Now just one other thing, your Honor. Mr. Tobey called to my attention with respect to what we discussed this morning, the following. Your Honor will recall that I attempted to state the evidence, what he would say, to show that the Lofendo checks credited to the account of the Merchandise Bank were the same checks as those listed on one of the exhibits that was discussed, this morning, and he called to my attention during the noon hour this fact, that the credit to the Lofendo account in the Bakersfield branch—I have got it mixed up. I will start again. I am sorry. [751]

I attempted to state this morning the basis upon which Mr. Tobey would testify that the debits to the United Produce Company account with Merchandise Bank, which he says were checks drawn by it to the order of Lofendo, were such checks. Now he suggested I supplement what I said in that connection with the following: The credit to the Lofendo account in the East Bakersfield branch is one total; that is the checks drawn by United Produce Company to the order of Lofendo which were credited to defendant's account at East Bakersfield

and charged against defendant's account in the Merchandise Bank. The debits to the United Produce account consisted, however, of several checks which were one total so far as the credit was concerned at East Bakersfield.

In order to show that the debits to the Merchandise account on one day are the same items as the credit to the Lofendo account on the corresponding day, we would like to introduce the deposit tags showing the deposits to the Lofendo account in the East Bakersfield branch. So we ask that those deposit tags be marked as our exhibit.

Mr. Lasky: That is, right from the beginning?

Mr. Erskine: When do they begin?

Mr. Tobey: From July 1st.

Mr. Erskine: July 1st.

The Clerk: This is defendant's exhibit WW.

Mr. Erskine: Then I would like to also say that Mr. Tobey, [752] in making the study upon which he would have testified has stated this morning, also compared the debits charged against the United account; that is, the debits of the Lofendo checks charged against the United account, with the Gassman list of checks drawn by the United Produce Company on its account on the Merchandise to the order of Lofendo.

Mr. Lasky: That is just argument.

Mr. Erskine: Well, it is just an additional basis upon which the study was made.

And then, if your Honor please, I feel that my statement of the basis of Mr. Tobey's study that I made this morning might not have been as accurate

as I would like to have it, and if I find that there are any faults with it upon reading the transcript, I would like, when the case is argued on Thursday, to call those to the Court's attention if I find any.

And with that the defendant rests.

Mr. Lasky: By way of rebuttal——

Mr. Erskine: Just one second.

Mr. Lasky: I don't understand that counsel reserves the right to offer more evidence on Thursday.

Mr. Erskine: No.

Mr. Lasky: When we are through today we are through.

Mr. Erskine: I am through; I would just like to check what I said this morning in order to determine that it is an accurate statement. [753]

I neglected to say this, your Honor; in Mr. Royds' deposition, the questions put to Mr. Royds upon that deposition referred to an exhibit marked for identification upon the taking of the Messenger deposition as 29 PP, and this is a photostat copy of it. In order to make clear the things Mr. Royds is testifying to, I would like to introduce that exhibit.

Mr. Lasky: You mean to make it clear what he said he knew nothing about? Isn't it sufficient to say that it is one of the what has been called interim assignments and schedules attached?

Mr. Erskine: Well, that has reference to several Lofendo accounts.

Mr. Lasky: All right.

The Court: Very well.

Mr. Tobey: I was instructed to check this morn-

ing during the Court, and I have done it, the checks on the East Bakersfield account against this list. I went over it. I was asked to do it this morning, and I checked it.

Mr. Erskine: What is the result of that check?

Mr. Tobey: I find that every check charged to the Lofendo account during the month of November is listed in the Gassman list.

Mr. Erskine: Yes.

Mr. Lasky: Just a moment. What is going on?

Mr. Tobey: I was instructed to check these. [754]

Mr. Lasky: What I said was that if Mr. Tobey assured me on the side that something was so, I would so stipulate.

The Court: You would so testify?

Mr. Tobey: I have done it.

Mr. Erskine: He has done it now. In other words, before coming to this other exhibit, as I understand the situation, Mr. Lasky stated that if Mr. Tobey would check the checks drawn by Lofendo during the month of—what was it, October?

Mr. Tobey: From October 25 to November 19.

Mr. Erskine: The checks paid or charged to that Lofendo account at the East Bakersfield branch from October 25 to and including all the checks charged against the account during November, against the Gassman list for the purpose of determining further—

Mr. Lasky: You are off on the wrong foot, Mr. Erskine. I wasn't interested in anybody checking anything against the Gassman list. You had a photo-

static copy of the United Produce Company ledger sheet at the Merchandise Bank on which Mr. Tobey had run some red lines. I merely said that you did not have items to check against that. You said you did. I said to check this, not against the Gassman list—

The Court: You have already agreed as to what Mr. Tobey would testify to with reference to that.

Mr. Lasky: Yes.

Mr. Erskine: You suggested that I put a bracket on that [755] exhibit which would comprise the checks that we had. That is what you asked me to do.

The Court: Yes.

Mr. Erskine: Did you do that, Mr. Tobey?

Mr. Tobey: No, they weren't all together, so I indicated it by putting a red line.

Mr. Erskine: I will get the exhibit.

Mr. Tobey: It is here; I used this one.

Mr. Erskine: Let me see that exhibit.

There it is. Mr. Lasky stated this morning, as I understood him, that if you put a bracket on this Defendant's Exhibit OO to indicate which of the checks there were Lofendo checks of which we had the originals, he would so agree. Now while you are doing that, Mr. Tobey, in order to wind the thing up, I would like to ask that this exhibit that I referred to which was mentioned in the Royds' deposition, which was marked at the time of the Chicago depositions as Messenger's 29-PP for identification, be admitted as defendant's exhibit next in order.

The Court: It may be admitted, subject to the plaintiff's objection, and a reserved ruling.

The Clerk: It is defendant's XX in evidence.

Mr. Erskine: As soon as that check is made by Mr. Tobey, that is our case.

Mr. Lasky: Can I take that assurance and commence offering my rebuttal? [756]

Mr. Erskine: Yes, that is right.

Mr. Lasky: First, as part of the plaintiff's rebuttal, I offer out of the deposition of Raymond L. Redheffer page 10, beginning line 17 through page 12, line 10.

Mr. Erskine: Pardon me; will you say that again?

Mr. Lasky: Beginning on line 17, page 10, through line 10, on page 12. And I will stipulate that it is no more material than your defense.

Mr. Erskine: That is all right.

Mr. Lasky: You have nothing to offer out of this?

Mr. Erskine: No.

Mr. Lasky: Then, Mr. Erskine, I have here the statement we prepared, and which has been checked through by Mr. Tobey with Mr. Messenger, entitled "The Lofendo account at the Bank of America N.T. & S.A., East Bakersfield branch, Tabulation showing Days on Which Payments were Made Against Uncollected Funds, the Amount Thereof, and Days on Which the Account Had a Collected Balance." May we stipulate that it correctly states the fact?

Mr. Erskine: Mr. Tobey tells me he made a check

of it. Are there any discrepancies between these two?

Mr. Tobey: When I was checking with Messenger we had the original lists and we agreed on the float deduction. This is on the actual payment dates of the items.

Mr. Lasky: No; we have done it here, and let me add [757] further, this goes upon the basis of three days for the float, because we were assured the other day by counsel that the Bank of America East Bakersfield branch actually assumed three days.

Mr. Erskine: That was incorrect.

Mr. Lasky: That was incorrect?

Mr. Erskine: That was incorrect. According to what Mr. Tobey now tells me, our instructions on such items were two days.

Mr. Tobey: Good on the third day.

Mr. Erskine: Good on the third day. Do you want to see the regulations? We have got them here to show you.

Mr. Lasky: Will you pardon me just a moment?

The Court: Yes.

Mr. Lasky: Because I have been somewhat misled by the previous information.

The Court: Mr. Lasky, is the information there taken from the records that are in evidence?

Mr. Lasky: I would have to check this. This actually was taken from the Lofendo account. Will you pardon me a moment and I will ascertain.

The Court: Surely.

Mr. Lasky: I apparently misstated what this was. This doesn't show any artificial period or

assumed period as to the float. This is the actuality as to the period of time in which checks were uncollected at the Bank of America, during [758] which time they were paying out against them. Upon that basis I would ask a stipulation that this is true. This was checked with Mr. Tobey, and I would like to offer it on that basis.

Mr. Erskine: The objection to it from our point of view, as I understand it, is that it might represent what happened in Chicago with respect to the actual books of the Merchandise Bank, but, as Mr. Lasky pointed out the other day, we don't know anything about those books.

Mr. Lasky: Ah, but we do.

Mr. Erskine: Wait a minute. Now in determining the float, or determining how long the East Bakersfield branch should give those checks to clear, all that the men in the branch did was to consider the directions which they had received from the bank itself as to how long a check received by them for deposit drawn on a Chicago bank would take to clear, and upon the basis of that direction the account was handled by the officers down there. Now the fact that the checks were not actually paid until after the period allowed for the checks to clear is, from our point of view, we believe, immaterial.

Mr. Lasky: There is a complete difference between the two situations. Counsel is trying to show something about uncollected funds at our bank, for the purpose of demonstrating, I assume, negligence on our part. We couldn't be negligent if we did not act upon information which was not accessible to

us. I considered the whole subject immaterial, but in response, I [759] offer this to show not negligence, but that there was no proximate causal relationship. When we are dealing with proximate causal relationship we are dealing with actualities and not assumptions.

The Court: You may make your objection and I will admit the document but reserve my ruling on your objection. But will you stipulate that the document reflects the records of the bank and the transactions as they occurred?

Mr. Erskine: Would you pardon me just one second?

The Court: We are not interested in rules now; we just want to know whether this reflects a true situation as matter of fact; not with reference to the rules or what you knew. For the time being it is being admitted subject to your objection. Now as to whether or not the fact that you did not know about how it was handled but that you actually did, if that is what happened, if you actually followed the rules rather than did not know of it—

Mr. Erskine: I think we would agree with it provided we could supplement it by data with respect to what the situation would be upon the basis of what the men in the Bakersfield branch did with respect to holding the checks for clearing. If they were directed that checks drawn on Chicago should be held for two days and should be deemed good on the third, if those were their instructions, then I want to show that. [760]

Mr. Lasky: Counsel, may I say this: when you bring up the two-day thing, you could lead to much further discussion, because I can pick out from Mr. Tarr's deposition wherein Mr. Tarr testified that they always proceeded on the three-day basis, and that is where the three days came from, and your own man assumed that.

The Court: I thought it was stipulated in chambers one day that it was a three-day basis.

Mr. Erskine: I don't remember that.

The Court: It occurs to me, now I don't know—

Mr. Lasky: I remember that distinctly.

The Court: I would have to check the record. I know that the matter was brought up in chambers, and that you then stated that it was handled, and Mr. Tobey did, that it was handled upon a three-day basis.

Mr. Lasky: All I want, counsel, is a stipulation that this is what it purports to be, now if you won't stipulate, I can call Mr. Messenger on the stand and take about two minutes.

The Court: Call him on the stand and let's get it over with.

Mr. Lasky: Take the stand, Mr. Messenger.

FREDERICK C. MESSENGER

recalled on behalf of the plaintiff in rebuttal, previously sworn.

Mr. Lasky: Mr. Messenger has already been sworn.

The Court: Yes. [761]

(Testimony of Frederick C. Messenger.)

Direct Examination

By Mr. Lasky:

Q. Did you make a study of records to determine with respect to the Lofendo account at the Bank of America National Trust and Savings Association, at East Bakersfield, from September 25, 1948, through November 17, 1948, whether on each day there was a collected balance or an uncollected balance, and if amounts were paid against uncollected funds? Did you make such a study?

A. Yes, I did.

Q. And what records did you consult for the purpose?

A. I consulted a photostatic copy of the Lofendo account in East Bakersfield. I checked the record of the United Produce Company ledger sheet in the Merchandise National Bank and the copies of the deposit tickets of the Lofendo account at East Bakersfield.

Mr. Lasky: Will you stipulate, counsel, that the papers which he has consulted are all in evidence?

Mr. Erskine: If you say they are, I will take your word.

Mr. Lasky: You just offered the deposit tags a few moments ago, and the Lofendo sheets and the United Produce are all in, are they not?

Mr. Erskine: According to my understanding they are.

Mr. Lasky: Will you mark this as plaintiff's exhibit next in order?

(Testimony of Frederick C. Messenger.)

The Court: Then this is just a computation from the records that are in evidence? [762]

Mr. Lasky: That is right. That is true of so much of what the defendant has been putting in.

The Court: Yes.

Mr. Lasky: I am only putting this in because of that, and I insist in getting in a similar sheet on the other side also computing from the records.

The Clerk: Plaintiff's Exhibit 33 for identification.

Q. (By Mr. Lasky): Is this result, Plaintiff's Exhibit 33, the result of your study?

A. Yes, it is.

Q. You say that it is correct? A. Yes, sir.

Mr. Lasky: I offer that.

The Clerk: Plaintiff's Exhibit 33 in evidence.

Mr. Erskine: No objection, your Honor, except that it may be that the basis of it is incorrect.

Mr. Lasky: I am through with him.

Cross-Examination

By Mr. Erskine:

Q. Mr. Messenger, in making the study, how many days did you allow for checks deposited to the account of Lofendo to clear?

A. You are referring to this schedule that we just talked about?

Q. Yes.

A. It is based on the actual payment of the items.

Q. The actual payment as evidenced by the Merchandise ledger [763] account?

(Testimony of Frederick C. Messenger.)

A. That is correct.

Mr. Erskine: That is all.

Mr. Lasky: That is all.

The Court: Very well.

Mr. Lasky: Counsel, I have here a bank examiner's report of the condition of the Merchandise National Bank of Chicago, the examination beginning December 30, 1948, and closing January 12, 1949, covering a period which includes the events of November and October, 1948. Will you stipulate with me that this is a true copy of the report delivered to our bank by the bank examiners?

Mr. Erskine: If you say it is, I will accept your statement.

The Court: Very well.

Mr. Lasky: If the Court please, I wish to offer in evidence the caption thereof and then only a portion of page 8. Here is what I have in mind: the caption identifies the document, and part of page 8 is entitled "Loans Exceeding the Limit Prescribed by Section 5200, Revised Statutes," and so forth, that being the section of the National Bank Act to which the defendant's answer refers. No other part of this bank examiner's report relates to that subject matter, and it contains, of course, confidential information about other customers. So I wish to offer—I have had photostats made of those portions of [764] course. I say to counsel that I will be glad to have the Court, if counsel wishes, examine the rest of it to make sure that I am correct when I

say that no other part bears upon the subject matter.

Mr. Erskine: What part of it discusses the period, Mr. Lasky? The period covered by the report? It says the examination commenced—

Mr. Lasky: It covers the period subsequent to the previous examiner's report, and I have stated to you and asked you to stipulate that the previous examiner's report would be earlier than October, 1948.

Mr. Erskine: You said that it covered a period in October and November, 1948. Where does it say that in the report. This seems to commence—

Mr. Lasky: It doesn't say in the report. The report gives the date of the examination and I state to you as a fact that the previous report occurred—

The Court: Prior to October, 1948.

Mr. Lasky: Prior to October, 1948. Now if we can't stipulate as to that—

Mr. Erskine: This goes back to the preceding report? This picks up the report from the last day of the preceding report.

Mr. Lasky: That is a matter of legal argument, that one report on matters of this kind, picks up where the preceding [765] report left off.

Mr. Erskine: If that is a fact—if you tell me it is the fact I will agree to it.

Mr. Lasky: It is the fact.

Mr. Erskine: I don't know. There is nothing to base any conclusion on.

Mr. Lasky: I assure you that it is a fact.

Mr. Erskine: Well, I suppose that I will take the assurance, your Honor, to facilitate things.

The Court: Very well.

Mr. Lasky: Then I ask that this be marked as plaintiff's exhibit next in order.

Mr. Erskine: I have an objection to it, if the Court please, I object to it on the ground that it is incompetent, irrelevant and immaterial; that it is hearsay; that it is not in any way binding upon the defendant in this case, and that, in a way, it is a self-serving document, self-serving from the point of view of the Merchandise, and also from the point of view of the comptroller's office.

Mr. Lasky: I am certainly prepared to argue the point.

The Court: I am not going to listen to the argument at this point, but cover it in your memorandum when it is filed. Subject to the objection of the defendant, upon which the Court reserves its ruling, the document is received in evidence.

The Clerk: Plaintiff's Exhibit No. 34 in evidence. [766]

Mr. Lasky: Now I ask Mr. Riordan to take the witness stand, with the Court's permission. Mr. Riordan has been of record as counsel.

The Court: What is the purpose?

Mr. Lasky: The purpose is this: Your Honor will note from the last exhibit the statement that the bank examiner should advise the directors of their individual responsibility if there has been any excess loans. Mr. Riordan was a director. I propose to put Mr. Riordan on the stand and ask him the conversation of the bank examiner with the directors on this subject. In other words, it being

part of the examiner's official to make any statement to the directors upon the subjects, I propose that in evidence.

The Court: Just as further cumulative proof?

Mr. Lasky: That is right. The evidence will be that the examiner, after submitting this report, told the directors that he had made a special examination of the United Produce Company and concluded there were no loans in violation of the statute.

The Court: What you have already introduced in evidence purports to show that there were none.

Mr. Lasky: That is right.

The Court: Of course he would not be advising the members of the board to the contrary. That follows. So that doesn't add anything. In other words, if that is admitted in [767] evidence and considered, there being no other attack upon it, it would be there.

Mr. Lasky: That is right. It is testimony that stated a negative, that there was no violation.

The Court: Sure.

Mr. Lasky: Correct.

The Court: If you care to do it, it is all right, but I think it doesn't add anything.

Mr. Lasky: Will you let me consult with Mr. Riordan for a moment?

The Court: Yes.

Mr. Lasky: Very well. I won't put Mr. Riordan on the stand then.

The Court: Very well.

Mr. Lasky: With that, the Plaintiff rests its rebuttal.

There is one more thing I want a stipulation from counsel that all the exhibits on the depositions and the photostats of which accompanied them to the Clerk's office, which have not yet been used by anybody, may now be released into my custody, because I want to complete my own files.

Mr. Erskine: Whatever Mr. Lasky wants is all right.

Mr. Lasky: They are just rubbish so far as the Clerk's record is concerned. They were unused exhibits on the depositions.

The Court: Very well. So ordered. [768]

Mr. Erskine: I have one more thing, and it is something that I myself do not very clearly understand.

Mr. Tobey tells me this: that under the rules of Bank of America, where a check was deposited with the Bakersfield Branch and sent forward with a cash letter, the rules required the bank to allow the check two days to clear if they wanted to avoid paying against the uncollected funds represented by the check. Is that correct, Mr. Tobey?

Mr. Tobey: Yes; that was given in my deposition.

Mr. Erskine: That is correct. Will you so stipulate? Mr. Tobey says that he would testify to that effect.

Mr. Lasky: What Mr. Tobey is saying here is no part of the record.

The Court: Oh, Oh, no, no.

Mr. Erskine: There it is; airmail items two days after mailing.

Mr. Lasky: To where?

Mr. Erskine: To Chicago.

Mr. Lasky: That is airmail.

Mr. Erskine: Airmail.

Mr. Lasky: These items were never sent by airmail.

Mr. Erskine: I think they were, or weren't they?

Mr. Tobey: I understand——

Mr. Lasky: The witness doesn't know. We have never heard of airmail. [769]

Mr. Tobey: They were sent out by airmail, I know that.

Mr. Lasky: This is a form of device which only a banker can understand, and I suggest, whatever it means, you put it in the record, I don't think it means anything.

Mr. Tobey: If you want to put it in the record, that is all I want you to do, so we can argue on it later. Put that in the record.

Mr. Erskine: I don't want to wear out the patience of the Court. Perhaps we had better testify about it.

LLOYD TOBEY

recalled on behalf of Defendant in surrebuttal:

Mr. Erskine: Will you mark that for identification?

The Clerk: Defendant's exhibit YY for identification.

Q. (By Mr. Erskine): I show you that exhibit, Defendant's Exhibit YY for identification, and ask

(Testimony of Lloyd Tobey.)

you to state whether or not those are the regulations of the Bank of America which controlled the time allowed checks for deposit to clear when the checks are drawn on Chicago banks? A. Yes.

Mr. Lasky: Just a moment; regulations can't control what happened. It is a regulation of the bank, I assume.

The Court: Yes, that would not be binding on the Merchandise.

Mr. Erskine: No; and it is a leading question.

Q. What is that regulation? [770]

A. This is the transrouting schedule that the Bakersfield branch in November, 1948, and for the month prior thereto handling the Lofendo account and under which it kept track of the amount of outstanding time on the items to Chicago.

Q. On the United Produce Company?

A. On the United Produce Company checks deposited to the Lofendo account.

Q. How much time?

A. Their instructions were that on all uncollected outstanding Chicago items they were to consider the mailing time of two days and that the items could be considered good there from the third day.

Mr. Erskine: That is all.

Mr. Lasky: If Airmail was used?

A. If Airmail was used, and Airmail was used in these cases.

Mr. Lasky: I move to strike out that "Airmail was used in these cases." This witness doesn't know.

(Testimony of Lloyd Tobey.)

The Court: It is obviously hearsay with this witness. It is stricken.

The Witness: Airmail was used.

Mr. Lasky: I move to strike that.

The Court: It is stricken.

Mr. Lasky: That is all.

Mr. Erskine: I will ask that that be admitted in evidence.

The Clerk: Defendant's Exhibit YY in [771] evidence.

Redirect Examination

By Mr. Erskine:

Q. Do you know anything about the practice of the East Bakersfield Branch with respect to the use of Airmail for the purpose of forwarding checks deposited to its customers?

A. I know that—

The Court: Just answer the question.

Mr. Erskine: Do you know of your own knowledge?

A. The branch is given instructions—

Mr. Lasky: Answer the question.

The Court: Just answer the question.

A. The schedule provides—

The Court: No, no.

Mr. Erskine: What is the fact?

The Court: We can see what the schedule provides. Do you know?

Mr. Erskine: Do you know the practice of the branch?

(Testimony of Lloyd Tobey.)

A. The practice of the branch is to use Airmail.

Q. Do you know that of your own knowledge?

A. Yes.

Mr. Lasky: Just a moment. Are you through?

Mr. Erskine: I am through.

Recross-Examination

By Mr. Lasky:

Q. You know that because you have been told?

A. That's right. [772]

Mr. Lasky: I move to strike the answer out as hearsay.

The Court: It may be stricken. It is hearsay.

Mr. Erskine: Do you know whether there are any rules and regulations of the Bank relating to that subject?

The Court: The practice doesn't make any difference, in any event; the particular items are here involved.

Mr. Erskine: That is all, Mr. Tobey.

Mr. Lasky: That is all.

Mr. Erskine: Nothing further from us.

The Court: Very well the evidence is closed on both sides on this point.

Mr. Lasky: Yes.

The Court: And we are going to meet on Thursday afternoon; is that right?

Mr. Erskine: Yes, your Honor, at 3:30.

The Court: At 3:30. I suppose in this Courtroom, but we had better check with the Clerk's office on that day.

Mr. Lasky: If the Court please, now that the evidence is closed, I wish to make a motion for leave to amend the complaint to conform to evidence.

I wish to amend the complaint in the following respects:

On page 3, line 7, I wish to change the figure of \$113,216.50 to the figure \$203,047.60; and on page 2, line 22, I wish to increase the figure \$296,451.97 to \$386,283.07; and in the prayer, where we pray judgment for the \$113,216.50 I wish to increase that to \$203,047.60. [773]

The basis of the motion to amend is that we were seeking to recover not merely \$113,216.50, but also the additional sum of \$89,831.10.

The information upon which this motion was made was not in our possession until Mr. Tobey and Mr. Erskine turned over to us so-called secret or confidential information from which we obtained a stipulation just Saturday and that stipulation shows the facts to be as follows, in connection with other evidence in the case: An advice of credit was received by the Defendant bank from the Merchandise National Bank covering the \$89,000 on the 16th after work and was not credited until the 18th, as of the 17th. Meanwhile, on November 17th, Mr. Messenger had telephoned to Mr. Estribou, and he put the Bank of America on notice that a fraud had worked upon us by our customer. He put them on notice that in fact there were several hundred thousand dollars of funds in the red, so

that the \$89,000 was not good. At that time he did not know the advice of credit had not yet been acted upon, so he did not speak of revocation. But under the case of Wiener vs. Root, to which we referred in our preliminary memorandum, if the defendant bank before it applied those funds, received notice it was chargeable with their return. The stipulation that we just entered into on Saturday shows that what happened to the \$89,000 was this: There had been kicking around the branch since the previous Friday, or the 15th of the month, checks for \$75,000, which the branch negligently failed [774] to have charged against the \$97,000 to which they gave credit on the 16th as of the 15th, then it charged against the \$97,000 checks for \$109,000, and then they had no funds available until this advice of credit came, when they seized this \$89,000 to pay the \$75,000 after they had already been put on notice by Mr. Messenger and also by Mr. LeRoy.

In the circumstances and in view of the fact which we just learned on this trial and of which we had no chance to learn before, we will ask leave to amend the complaint and pray for the larger sum.

Of course we don't want to argue the matter now. I am just stating what are the reasons. I think our right is controlled by Rule 15 of the Rules of Civil Procedure, which provides that the Court shall be liberal in permitting amendments after the evidence is all in; the Court should be very liberal in permitting amendments to provide that all matters be considered and disposed.

The Court: Yes.

Mr. Erskine: I, of course, your Honor, object to the granting of any such permission. If they were going to sue us for the additional \$89,000, they should have done so at the time they filed their complaint.

When Mr. Lasky says that he just learned the facts upon which he bases his claim to amend his complaint, he is not, according to my understanding, stating the true situation. He was threatening me with such action when we were back in [775] Chicago.

Now, I do not propose at this time, your Honor, to enter into a discussion of the facts and the law relating to the point. I understand that Mr. Lasky is not asking for a ruling at this time.

The Court: He is asking for a ruling as to whether or not he may amend his complaint.

Mr. Lasky: So before the argument on Thursday I can have it in writing in that form.

Mr. Erskine: I don't believe he should be permitted to amend, your Honor. The claim that they made against us was for \$113,000. That claim is based upon the contention that they had a right to revoke the credit for the six checks. The facts relating to that credit were, as I recall them, were substantially this: The advice of credit was sent out on November 15th. On that day the account of the Bank of America kept by the Merchandise was credited with \$113,000. On that day the account of the United Produce Company was debited with the \$113,000. On that day, or on the next succeeding day, in the regular routine, the checks were

marked "Paid"; but the advice of credit with respect to the six checks stamped "Paid" was mailed on November 15th.

On November 17th, Messenger telephoned to Etribou. In that conversation he told Etribou that the bank had suffered a loss in the United Produce transactions, and he asked him whether or not the advice of credit with respect to the six [776] checks had been received. Etribou replied that that advice of credit had not been received. Then there is a conflict between the two men as to what was said from there on, and into which I will not go. That all relates to the six checks.

Now, what happened to the four checks on the \$89,000? The four checks were sent back by a collection letter. As I recall. My recollection is that the four checks were received at the Merchandise bank either on the 12th or the 13th; I think it was on the 12th. On the 12th they did the same thing with the four checks which I have described with the six. They debited the United Produce Company account, they credited the Bank of America, and they sent out an advice of credit to the effect that the four checks were paid. The advice of credit was received on the 16th. It was not posted on the 16th and it was not posted until the 18th. It was posted on the 18th as of the 17th.

It is true that the Bank of America did not reject the three checks which were deposited with it on the 13th, which was a Saturday. It had to reject them on that day, though otherwise it couldn't re-

ject them; otherwise they had to give the credit. Those checks were drawn by Lofendo in favor of the United Produce Company. They had been deposited in the Merchandise Bank to the credit of the United Produce Company. The charge against that credit had been made. So the United Produce Company got the advantage of those three checks that we did not [777] reject. Now, we could have rejected them, but we did not reject them. It was our intention to reject them, but they were not rejected. We did not to reject, we could give immediate credit.

Then, your Honor, what happened from there on was this: that the \$97,000 was credited to that account. Again checks in favor of United Produce Company, of which the Merchandise Bank got the benefit, were then charged against that credit of \$97,000. Then the advice of credit for the \$89,000 for the four checks came into the bank and three checks which had not been rejected and which had not been charged against any credit were then charged against the \$89,000. That was in the ordinary course of the banking business.

And certainly, certainly those four checks had been paid. They were treated in the same way as the six checks, and thereafter—without regard to that those four checks had certainly been paid.

Now, for the Plaintiff to come in at the eleventh hour and attempt to increase its demand by \$89,000, it seems to me, is not at all justified, and he should not, I respectfully submit, be permitted to file his amended complaint.

Mr. Lasky: Of course at the proper time I am prepared to argue it, but my point now is, that we did not develop the information earlier upon which we now base our claim here because of counsel's refusal to give us the confidential report. [778]

In Chicago counsel himself brought up the question to witnesses, as he did here at the trial: what was the difference in our manner of treating the \$89,000 from the \$113,000, if we had made the error on the one, hadn't we made the error on the other. Of course we had made the error on the other, the \$89,000. Our reply to that was you had already received the advice of credit; there was nothing we could do and at that time I said to counsel, "If there are some concealed facts on this, we may have to amend." Of course I asked him to produce all the details on the \$89,000, when we got back to San Francisco, because he told me he had already given me all the information about what had happened in the Lofendo account, and yet I never got any of that information about the \$89,000 until after some discussion in the courtroom. I finally succeeded in getting the real facts of the matter. I think we should be permitted to amend the complaint. True, your Honor's order permitting the amendment does not mean that your Honor will or will not grant judgment accordingly.

The Court: That is what I was going to say. It seems to me, counsel, you can argue the facts of the matter as to whether Plaintiff is entitled on the facts, to a judgment in the increased amount. That can be argued. All the evidence is in, and surely, if

Plaintiff is entitled to it, he should be permitted to have it. If he is not entitled to it, the evidence is here and it will be decided. [779]

That is the very purpose of the rule.

Mr. Lasky: Yes.

The Court: When these matters are developed during the course of the trial, if an additional claim develops during the course of the evidence, it can be adjudicated.

Of course your argument that you have just made goes to the merit of the claim, not as to whether or not counsel should be permitted to amend and state a claim; but as to whether or not he should recover upon that claim that he speaks of. And I think the Court if there are sufficient facts upon which Plaintiff would be entitled to recover, justice would of course dictate that Plaintiff recover; if there are not, justice will dictate that Plaintiff shall not recover; if the facts are there.

So leave to amend the complaint is granted. Make your arguments, and of course, for my benefit, separate these amounts in your arguments and in your memorandums thoroughly.

Mr. Lasky: Perhaps it might therefore be convenient and facilitate segregation if I should set this up as a second count instead of changing the figures in the first count.

Mr. Erskine: Change the first count, then I won't have to file an amended answer.

Mr. Lasky: All right; I will change them in the first count.

Mr. Erskine: It will be understood that my amended answer, [780] the one already filed—

The Court: Your amended answer will stand to the amended complaint.

Mr. Lasky: So agreed. I will have the written amended complaint in your possession before the argument on Thursday and will have it with the Court by then.

The Court: Very well. I will hear the oral arguments then on Thursday and at the times agreed upon. We will state those on Thursday. I don't recall the times now for the submission of proposed findings of fact and conclusions of law and briefs supporting your positions.

Mr. Lasky: Very well.

The Court: Very well. The Court will stand in recess until 3:30 on Thursday. [781]

Thursday, June 29, 1950, at 3:30 P.M.

The Clerk: Merchandise National Bank vs. Bank of America.

Mr. Erskine: If the Court please, before we proceed with the argument, I would like to make a short motion, and in support of the motion I am going to file this affidavit which I want to deliver to the Court now. It is a motion under Section 63 of the rules to set aside the order granting the plaintiff leave to file an amendment to his complaint.

In this affidavit I have quoted part of LeRoy's deposition in Chicago, and which in the language of the affidavit says that Mr. Lasky stated there that he was seriously considering filing an amendment to

his complaint or a claim for the \$89,000 covered by the amendment which the Court granted him leave to file the other day. [782]

* * *

The Court: Do you have anything to say, Mr. Lasky?

Mr. Lasky: Yes, I will just take a [784] moment.

* * *

As to having been taken by surprise, the rights to the \$89,000 are actually covered by the facts which have been stipulated to. It isn't a question in dispute as to the facts, and counsel hasn't actually been taken by surprise. I place it upon the ground that not until the last day of the trial when we finally got to the stipulation as to what would be shown [785] and demonstrated by virtue of Mr. Tobey's report, did we find any basis upon which we could have sought any such relief.

The Court: Well, what about Mr. Erskine's position with reference to whether or not all of the facts concerning that amount are in evidence, in other words, so that he can assert his defense to that claim?

Mr. Lasky: They are in fact in evidence. If he says he has got some other facts which would bear on that, it might be appropriate for the court to let him introduce them. But what would they be? We know what the time relationships are. We have stipulated to them. We are basing this part of the case on the undisputed evidence on which the witnesses

on both sides agree as to conversations and as to the stipulated facts.

The Court: I am not going to rule upon this matter at this time. I will take your motion under advisement. If, Mr. Lasky, you wish to file with the court in response to the motion any affidavit or otherwise—

Mr. Lasky: Yes, I should be glad to do that. May I do that accompanying our brief in this case?

The Court: Yes.

Of course, in the natural course of events, I will rule upon this before I proceed to a consideration of the facts upon which your amended complaint goes.

Mr. Erskine: May I file a response to Mr. Lasky's [786] affidavit, your Honor?

The Court: Yes.

Mr. Erskine: And I of course am going to read this transcript.

The Court: Yes.

Mr. Erskine: And if I conclude from reading the transcript that any of the facts relating to the \$89,000 are omitted, which I believe they are, and if the Court denies my motion, then I certainly ought to have some opportunity to present those facts.

The Court: In the first place, I think that you should submit to the court an affidavit with reference to the facts that you—

Mr. Lasky: It may well be we could stipulate to the facts and how those are relevant.

The Court: —with reference to any facts that

you may assert in the event that the motion is decided contrary to your position.

Mr. Erskine: I will do that after I have gone over the record.

The Court: Yes; you can do this in conjunction with your memorandum and briefs on the case as a whole.

Mr. Lasky: Yes.

The Court: And it will be given consideration.

Mr. Lasky: I feel quite confident that it will be discovered [787] that there is nothing or no way in which counsel has been prejudiced.

The Court: Then of course if your motion is denied but there are some facts which the Court might want to hear, it might be that you could stipulate to them. I will keep in touch with you on it. If not, if you can't stipulate to it, it may be that I would have to reopen the matter to that extent at a later time to take that additional evidence if you present by way of affidavit what that evidence will be.

Mr. Lasky: As a matter of fact, in my argument of this afternoon, I propose to touch on the \$89,000 so counsel will be able to perceive now what our theory is and whether there is any evidence that could possibly bear on it that isn't in the record.

May I present the amended complaint for filing?

The Court: Yes, it may be filed.

Mr. Lasky: Shall I proceed, if the court please?

The Court: Yes, you may proceed.

[Endorsed]: Filed August 24, 1950. [788]



No. 13039

United States
Court of Appeals
for the Ninth Circuit.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, and EUGENE J. O'RILEY, as Trustee in Bankruptcy of the Estate of UNITED PRODUCE COMPANY, a Corporation, Bankrupt,

Appellants,

vs.

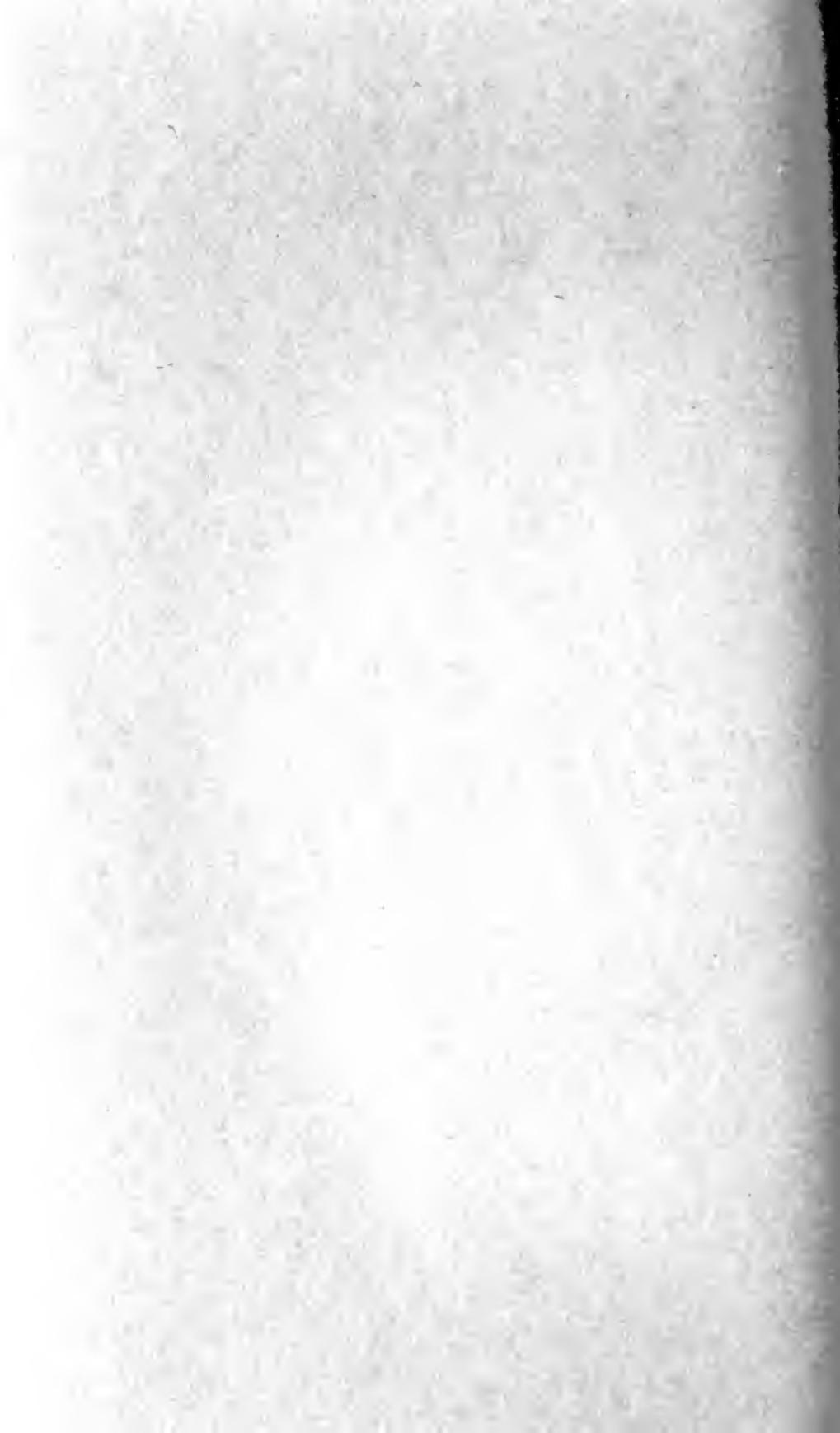
MERCHANDISE NATIONAL BANK OF CHICAGO, a National Banking Association,

Appellee.

Transcript of Record
In Three Volumes
Volume III
(Pages 833 to 1156)

Appeals from the United States District Court,
Northern District of California,
Southern Division.

NOV 14 1951



No. 13039

United States
Court of Appeals
for the Ninth Circuit.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, and EUGENE J. O'RILEY, as Trustee in Bankruptcy of the Estate of UNITED PRODUCE COMPANY, a Corporation, Bankrupt,

Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHICAGO, a National Banking Association,

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Appeals from the United States District Court,
Northern District of California,
Southern Division.

[Title of District Court and Cause.]

DEPOSITION OF FREDERICK
C. MESSENGER

* * *

Direct Examination

By Mr. Erskine:

Q. The record shows a balance, a credit balance, as of the close of business on November 13th, 1948, of \$241,525.04; is that right?

Mr. Lasky: It speaks for itself, does it not?

A. In so far as that record is concerned, it shows that balance, but that was not the balance of the United Produce Company on that date.

Q. (By Mr. Erskine): What was the balance of United Produce Company on that date?

A. That figure—

Mr. Erskine: Pardon me; I will withdraw that question, and we will perhaps come to it later on.

Q. At any rate, Mr. Messenger, when the six checks were debited against the account of the United Produce Company as of November 15th, 1948, they were debited against what the books showed a credit balance to the account of that concern, as of the close of business on November 13, 1948, of the amount I have stated, that is \$241,525.04; that is correct, is it not?

A. Those charges were made against the balance indicated. [63*]

Q. Now, I notice on this Defendant's Exhibit No. 2 for identification that, in the entries that were

(Deposition of Frederick C. Messenger.) made on November 17th, 1948, an entry was made on the debit side, of \$228,843.01, which was thereafter stricken out, and alongside of that item appear in handwriting the initials "E. C."

Mr. Lasky: Pardon me, but will you show me, please, what you are referring to now?

Mr. Erskine: Just a moment. Let me finish my question first.

Q. (Continuing): Will you tell me, please, what that item was, and why it was stricken out, and why those initials "E. C." were put on there?

A. The balance indicated here on November 16th, was \$228,843.01; and the bookkeeper, in making up this balance under the November 17th date, did not return her carriage to the proper place, and this transaction was posted where checks are normally posted; and the marking out of that, with the initials "E. C." means "Error Corrected."

Q. In other words, that item of \$228,843.01, instead of being shown in the debit column, should have been shown in the column to the left, which is not shown on [64] the statement itself; is that correct?

A. It should have been shown on our journal sheet.

Q. On your journal sheet? A. Yes.

Q. To represent the balance to the credit of the customer as of the beginning of that day, that is, November 17th, 1948. A. Yes, sir.

Q. But instead of putting it on the journal

(Deposition of Frederick C. Messenger.)

sheet, the bookkeeper by mistake put it in the column showing the debits? A. Yes, sir.

Q. And thereafter struck it out, and showed the change? A. Yes, sir. [65]

* * *

Q. (By Mr. Erskine): When were they stricken out? A. On the 19th.

Q. After they had been posted?

A. Yes, sir.

Q. Now, Mr. Messenger, we have been referring in this case to the six checks which are the principal part of the controversy in the case. I show you the third page of this Defendant's Exhibit No. 2 for identification, and will ask you to state whether or not the six checks are entered on this page as of November 19th.

Mr. Lasky: Pardon me; you mean the fourth page, do you not?

Mr. Erskine: Or rather—yes. Pardon me. I meant to refer to the fourth page.

A. Those are entries of November 19th.

Q. (By Mr. Erskine): I will call your attention to this fourth page of the exhibit, where there is a faint bracket, with the numeral 113 appearing opposite the bracket. A. Yes?

The checks within the bracket are the six checks, are [74] they not, Mr. Messenger?

A. That is right.

Q. And that entry, the entry of those six checks, was made on November 19th, was it?

(Deposition of Frederick C. Messenger.)

A. November 19th is the entry date of those on the bank, yes, sir.

Q. And at the same time that they were entered, or contemporaneously with the entry of those items in the credit column as of November 19th, they were stricken out; is that right? A. Yes, sir.

Mr. Erskine: Off the record, Mr. Reporter.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Erskine: Shall we recess at this time until one-thirty?

Mr. Lasky: That is agreeable.

(And thereupon, at the hour of 12:30 o'clock p.m., the taking of said deposition was recessed until the hour of 1:30 o'clock p.m. of the same day, Saturday, December 3rd, 1949, at the same place.) [75]

* * *

Direct Examination
(Continued)

By Mr. Erskine:

Q. Mr. Messenger, before proceeding to take up with you the next thought that I have in mind, I would just like to make sure about one thing, and that is this: These entries on the fourth page, I believe it is, of Defendant's Exhibit No. 2 for identification, in the deposit column, and the credit column, which were stricken out as of November 19th—

(Deposition of Frederick C. Messenger.)

Mr. Lasky: Just a moment. I object to that question as being incorrect. There is nothing on this document that shows that they were stricken out as of any date.

Mr. Erskine: That is correct. Let me reframe the question.

Q. Referring to Defendant's Exhibit No. 2 for identification, that shows on the fourth page thereof the entry in the deposit column of the six checks as of November 19, 1948: That entry, pursuant to the practice of delayed posting, was entered on the 20th of November, was it not? A. Yes, sir.

Q. And of course the items were stricken out after they were posted; that is obvious, is it not?

A. The items were stamped with that [77] line—

Q. After?

A. —after they were posted.

Q. After they were posted? A. Yes, sir.

Q. Do you know when they were so stamped?

A. After the posting.

Q. After the posting was done, do you know when they were so stamped? A. The 20th.

Q. On the 20th? A. Yes, sir.

Q. At whose direction was that done?

A. It is the practice to do that; that is the general practice of the bank.

Q. Well, at whose direction was the practice followed in this instance? Was it yours, personally?

A. That practice has been in existence for a good

(Deposition of Frederick C. Messenger.)

many years, and I had some part in establishing the practice at the beginning, but just when that was, I do not know.

Q. Well, the practice to which you refer, I take it, is the practice of striking out an item when the check is returned ; is that right ?

A. That is right. [78]

* * *

Q. (By Mr. Erskine) : So, as I see it, Mr. Messenger, looking at this, these three columns under the heading "Notes Payable," particularly the second and third lines on the front side of Exhibit 23-A, you have a payment on that day from your collateral account of \$18,075.30 reducing the debt of the United Produce Company from \$200,000.00 to \$181,924.70, and on the same day you have made a loan of the amount of the payment, namely, \$18,075.30, to United Produce Company, so as of that day the indebtedness of United Produce Company to the bank on its note account remanded the same as it had on the preceding day, that is, \$200,000.00.

A. That is correct.

Q. And that is so, apparently, throughout the period as indicated by the entries made in the columns under the title "Notes Payable"?

A. The entries appearing on Defendant's Exhibit 23-A through 23-M under the "Notes Payable" title are the same type of entries, subject to adjustments, which appear therein. I believe each adjustment [277] is indicated with a little "X" on it, and

(Deposition of Frederick C. Messenger.)

is true up through the entry appearing December 1, 1948, the entry appearing on December 6, 1948, and thereafter representing the entries made by the bank and not being applicable to transactions between the United Produce Company and the Merchandise National Bank direct.

Q. In other words, the entries on December 6 and thereafter, like the other entries on the other records of the same day, thereafter were made for the convenience of the bank in closing up the situation and not to reflect any business transactions between it and United Produce Company?

A. That is correct.

Q. Now, you have another record there. What does that record show? Is that your draft account?

A. That represents the liability ledger covering drafts discontinued for the United Produce Company.

Mr. Erskine: I would like to have the Reporter mark these documents as Defendant's Exhibits beginning with Defendant's Exhibit 24-A, mark them for identification.

(Whereupon said documents above referred to were thereupon marked by the Reporter as Defendant's [278] Exhibits 24-A to 24-III for identification.)

Q. (By Mr. Erskine): Now, Mr. Messenger, these exhibits Defendant's Exhibit 24-A to the end represent what?

A. These sheets running from Defendant's Ex-

(Deposition of Frederick C. Messenger.)

hibit 24-A to 24-III represent the liability ledger sheets covering drafts discounted by the United Produce with this bank.

Q. For the period indicated by the sheets?

A. For the period indicated by the sheets.

Q. Now, just in order to try to clarify the thing so I will understand it, Mr. Messenger, take the first page here, the front of the first page, Defendant's Exhibit 24-A for identification, and there is a date under the column headed "Date," on the left-hand side of the sheet, the first date appearing appears to be December 31, 1947, the "7" seems to be stricken out, but I have no doubt that was what was intended, and opposite that date is the number 127,030, and I take it that represents the number of the draft?

A. Represents the number which the bank placed on the draft as a means of identification. [279]

Q. The other numbers appearing in that same column, which is entitled "Memorandum," and under the word "Memorandum" the words "Endorser" or "Maker," represent the same thing, that is, the numbers given by the bank to the drafts of the United Produce Company which were delivered to it? A. That is correct.

Q. That is so throughout the sheets?

A. That is true.

Q. The sheets of this same Exhibit 24?

A. That is true. Without referring to every sheet, referring to the first page, this represents the numbers that the bank has given as an indica-

(Deposition of Frederick C. Messenger.)

tion or identification of those particular drafts.

Q. Have you any reason for believing that there is any difference in the other sheets, in the numbers appearing in the other sheets under the same column?

A. There would be no difference in so far as numbers is concerned, but it is possible that under that memorandum column there might be some other memorandum of some kind in there.

Mr. Lasky: There are 208 pages in that exhibit.

Q. (By Mr. Erskine): So far as the numbers shown in that column are [280] concerned, they all represent numbers given by the bank to the drafts and delivered to it by the United Produce Company? A. That is correct.

Q. Now, I have used "Delivered to it" Mr. Messenger, but would it be proper for me to say "The drafts discounted by the Merchandise Bank for the United Produce Company," is that the banking term given to the operation under which you took these drafts?

A. The United Produce Company did deliver the drafts to us, and we did discount them for them.

Q. Yes. And that is the proper description of the operations shown on this exhibit for identification 24-A to 24-III with respect to all the drafts shown on the sheet? A. That is right.

Q. The United Produce Company delivered those drafts to you, that is, to the bank, and the bank discounted the drafts for the United Produce Company? A. That is correct.

(Deposition of Frederick C. Messenger.)

Q. Now, I show you, Mr. Messenger, the next column in which any figures appear on this sheet, the front of this sheet, 24-A, and that is the column headed "Debits," and I will ask you to tell me what the [281] figures in that column indicate.

A. Those figures represent the amount of the individual drafts discounted, the face amount of those drafts, each line covering an entry for an individual draft.

Q. Going down to the number 127,410, opposite the date December 31, 1947, on this, the front of this sheet 24-A, there is a figure in the debits column, \$1,762.00: I take it that is the amount at which the United Produce Company discounted with the bank the draft bearing that number 127,410?

A. That is the amount of the draft that the bank discounted for United Produce Company.

Q. That is a better statement of it. It is the amount of the draft which the bank discounted for the United Produce Company. Now, when the bank discounted these drafts referred to on this Exhibit 24, did it pay the United Produce Company on that discounting of the draft the face amount of the drafts?

A. The bank credited the commercial account of the United Produce Company with the face amount of the draft.

Q. Now, we have here another column on this Exhibit 24-A to 24-III, entitled "Credits," and on the front [282] of this sheet—

A. (Interposing): Pardon me, could we con-

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tinue to refer to this particular page so it would not be necessary for me to go through all of them? The only purpose I had in mind, if I am going to refer to it as a whole procedure I would want to examine each individual sheet. If we are talking about the particular entries on one sheet, that is one thing.

Q. I can see what you mean. I suggest this, Mr. Messenger, that in my examination of you that I will refer to the front of Defendant's Exhibit 24-A for identification, then at your leisure you examine the rest of the sheets, and if you find any exceptions to what you will testify about the face of the sheet 24-A, you can state those exceptions later, tomorrow or the following day, would that be convenient for you?

A. I will leave that to counsel to determine.

Mr. Lasky: You can ask him about the face of 24-A and his answer will apply to 24-A. I would not want the assumption that his answer would apply to the whole thing, if he does not speak about it again.

Q. (By Mr. Erskine): Your answers will apply only to the face of the sheet 24-A. But, at some later time during the taking [283] of these depositions I will ask you if your answers apply to all the sheets, and if they do not, that is, your answers with respect to the face of the sheet 24-A, the answers you will give with respect to the face of the sheet 24-A will apply to all these sheets, and if they do not the exceptions in which they do not apply you

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at that time can give me the exceptions. Is that all right?

Mr. Lasky: That is an awful task you are giving him to read those pages.

Mr. Erskine: I want the information. Otherwise I will be left up in the air.

The Witness: I don't like to make an answer and answer questions relative to one particular sheet, and then have my answer construed to mean that it applies to all of the sheets that are there.

Mr. Erskine: I have made it perfectly clear that I will take the answers that you give this afternoon as applicable only to the face of Exhibit 24-A.

Mr. Lasky: Then if time permits he will look at the rest, so that you can put another question to him about the rest of it later.

Q. (By Mr. Erskine): Later on I will ask you whether or not the [284] answers which you will give this afternoon and they, according to our understanding, will apply only to the face of the sheet 24-A, and I will ask you if those answers apply to the rest of the sheets, and you can then tell me, after you have examined the other sheets at your leisure. Then, to go ahead, I call your attention to the column on the face of 24-A, "Credits," and I call your attention to the fact that there are certain dates given on certain lines of that column, and figures given on other lines of that column: Will you please explain the dates and the figures—

A. The dates appearing in the credit column on Defendant's Exhibit 24-A represent the date on

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which the amount appearing just before it, the draft covered by that amount was eliminated from the record by having received payment from the bank, to whom this draft, was sent for collection. There is a possibility that maybe some of these drafts were returned unpaid, and in that case, the date would indicate the date which that draft was charged back against the United Produce Company account.

Q. In other words, the date indicates either the date of payment or the date of charge-back? [285]

A. That is correct.

Q. Does the sheet show which of those things was true with respect to the draft to which the date applies?

A. Without going through all of them it would be hard for me to make a statement.

Q. Can you find any entry there which indicates which of those two things was done? Take the face of the sheet—

A. On the first sheet there is nothing to indicate the disposition either way.

Q. I see. The entry itself does not indicate whether the draft was paid or charged back?

A. That is right.

Q. Was there any record kept in the bank which would indicate whether the draft was paid or charged back?

A. A copy of the collection letter in which these drafts were sent out for collection would bear an

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indication of whether or not the draft was paid or charged back.

Q. If the draft was paid by someone other than the drawee of the draft would the collection letter indicate that?

A. The collection letters are sent to other banks and we receive their payment or the return of the draft [286] unpaid. We would not have any record of what actions the bank to whom we sent the item took in so far as whether it was paid by the drawee or by somebody else.

Mr. Lasky: You could have answered the question "No."

Q. (By Mr. Erskine): Now, Mr. Messenger, I don't know as I got clearly the first part of that. Let us take this draft we mentioned a while ago, the one which your bank discounted for the sum of, the draft which was for the sum of \$1,762.00, to which your bank gave the number 127,410, and opposite that figure \$1,762.00 is the date January 14, 1948: Do I take it, I may be quite wrong about this, do I take it that your answer means that on January 14, 1948, that particular draft was paid and your bank received payment?

A. It was paid on that day.

Q. Or charged back? A. Or charged back?

Q. Yes; and the other dates in this column headed "Credits" on this sheet 24-A indicate with respect to the drafts, the amount of which is opposite dates in the column "Debits" the same thing, either payment [287] or a charge-back?

A. That is right.

(Deposition of Frederick C. Messenger.)

Q. I call your attention to the figures in this column headed "Credits," and I will ask you what do they refer to.

A. Those figures refer to the amounts of drafts that were paid or charged back on the dates on which those entries appear, and in the memorandum column are numbers which refer to the identification number that had been given those drafts when they were originally discounted.

Q. Now, I notice, Mr. Messenger, that the fifth figure under the date of December 31, 1947, appearing on sheet 24-A, is 127,137, which is a lower figure than the first figure appearing opposite that date, of 127,410, so evidently the figure in the fifth line to which I referred refers to a draft which had been discounted by the bank prior to the transaction in which the first figure 127,410, before the draft designated by that figure, 127,410, was discounted by the bank?

A. That is true.

Q. And so the figure opposite the figure in the column headed "Credits," opposite the designation 127,137 [288] refers to the payment or charge-back of a draft which had been discounted at the bank prior to the draft which the designation 127,410 refers?

A. That is correct.

Q. Now, it still leaves me somewhat up in the air because as I understood you the date January 14, 1948, on the same line as the designation 127,410, refers to the payment or charge-back of that particular draft?

A. If you will refer to the sheet showing the

(Deposition of Frederick C. Messenger.)

date of January 14, under the line you will note that there is a line indicating payment or charge-off.

Q. Indicating the disposition of draft 127,410, is that right?

A. That is right. On the back of Defendant's Exhibit 24-C there is an entry indicated by number 127,410 which shows a credit of \$1,762.00.

Q. Yes, I see. In other words, each draft referred to on this Exhibit 24 is referred to twice, first on the date when it is discounted by the bank, and then when it is either paid or charged back?

A. That is correct.

Q. Now, you have another title of "Unsecured," over two columns, "Indirect" and "Direct." Would you mind explaining to me to what those columns refer on that sheet 24-A, the face of the [289] sheets?

A. The heading "Unsecured" followed by sub-headings "Indirect" and "Direct," as headings, have no bearing covering the figures that appear in those columns below. The figures that are listed in the column marked "Indirect" represent the total of drafts discounted on the date on which that line appears, and, the figures that appear in the column marked "Direct" represent the total of the drafts which were either paid or charged back on the date indicated for those lines.

Q. I think that is pretty clear. In other words, the headings "Indirect" and "Direct" have no reference to the figure in those columns?

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A. That is correct.

Q. Taking that first figure that appears in the column "Indirect," \$10,225.27, that represents the total of the drafts in the hands of the bank discounted for United Produce Company as of that date? A. No, sir, discounted on that date.

Q. Discounted on that date. And the column and the figures appearing in the column marked "Direct" represent the total of the drafts either paid or charged back as the, the date indicated?

A. That is correct.

Q. Then you go over to the right-hand side here, [290] the column headed "Total liabilities," and you have a figure in that column in the third line of, the fact of the sheet 24-A, \$150,406.44. That, I take it, is the total of drafts discounted by the bank for United Produce Company as of that date, January 7, 1948?

A. Not as of January 7, 1948, because that date there is just—

Q. In the credits column?

A. —a memorandum date on which the draft—

Q. Oh, yes.

A. —indicated there was paid or charged back. This amount of \$150,406.44 would be the amount of drafts discounted and owned by Merchandise National Bank at the close of business December 29, 1947.

Q. December 29, 1947. I see. And the next

(Deposition of Frederick C. Messenger.)
figure appearing in that column headed "Liabilities," on the face of the sheet 24-A, the figure \$147,270.48, that is the total of the drafts discounted by the Merchandise Bank for United Produce Company as of the close of business on December 31, 1947? A. That is right.

Q. In other words, on the face of this sheet 24-A, the date which is applicable to the figure in the column headed "Liabilities" is the date on the left-hand side of the sheet? [291]

A. That is right.

Mr. Erskine: Now, subject to the suggestion I made a while back, Mr. Messenger, that you review the other sheets, in the light of your testimony, in order to let me know whether or not your testimony with respect to the face of the sheet which has been marked Defendant's Exhibit 24-A for identification, is applicable to the other sheets, I will discontinue my examination of you at this time with respect to that particular Exhibit.

Now, off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Lasky: Well, now, I think we had better have this on the record. You are requesting now exactly what document?

Mr. Erskine: I am asking for a copy of an agreement which I understand exists between the Merchandise Bank and the United Produce Com-

(Deposition of Frederick C. Messenger.)
pany, under which the Merchandise Bank, according to my understanding, maintained and operated the business transactions between it and the United Produce Company.

Mr. Lasky: Well, what I have before me is not any agreement with the United Produce [292] Company.

Mr. Erskine: Not signed by the United Produce Company?

Mr. Lasky: Yes, it is signed—the document is signed by the United Produce Company.

Mr. Erskine: May I have that document? I think it relates to what I want to examine the witness about.

Mr. Lasky: I do not think that you are entitled to it but I will let you see it, anyway.

Mr. Erskine: I would like to have it marked as Defendant's Exhibit No. 25 for identification.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 25 for identification.)

Q. (By Mr. Erskine): Now, Mr. Messenger, Defendant's Exhibit No. 25 for identification is dated September 10, 1945. I have not read it carefully, although I did read it sometime ago, that is, I read it a few days ago, but my recollection is that it relates to the manner in which collateral is to be pledged by the United Produce Company with the Merchandise Bank.

Do you have any supplement to that agreement,

(Deposition of Frederick C. Messenger.)
the document marked Defendant's Exhibit No. 25
for identification?

A. I do not know of any supplement to it, no,
sir. [293]

Q. It refers to a maximum loan of \$175,000,
whereas the Liability Ledger which you showed
me a little while ago shows a maximum loan of
\$200,000.

A. I do not know of any written supplement
to that memorandum. There were oral arrangements,
but I do not know of any written memorandum,
I personally do not know of that document
being supplemented by a written memorandum.

Mr. Lasky: That is why I said it was not an
agreement with the United Produce Company, even
though signed by the United Produce Company.
It does not purport to be an agreement.

Q. (By Mr. Erskine): As I say, I have not yet
read it carefully, but I will examine it carefully,
and I am making a note to do that right now.

Now, Mr. Messenger, you have shown me certain
records of the Merchandise Bank which we have
here. Has the bank any other records which relate
to its business transactions with the United Produc-
e Company, other than the ones which we have
been discussing?

A. All of the transactions of the United Produce
Company with the Merchandise National Bank,
so far as I am able to recollect at this moment,

(Deposition of Frederick C. Messenger.)
have found entry in one of the various records
which you have here in [294] exhibits.

Q. Now, Mr. Messenger, did the United Produce Company maintain with the Merchandise Bank, or did your bank maintain for the United Produce Company, in relation to its business, an account that was called a Suspense Account, in which cash from time to time was deposited, received by the bank from Accounts Receivable pledged to it by the United Produce Company?

A. In connection with the collateral to the indebtedness of the United Produce Company, or covering the indebtedness of the United Produce Company that we had, there were certain stocks at one time which were held as collateral, and later substituted by bonds.

Q. Do you mean, Mr. Messenger, that later bonds were substituted for the stock—is that what you mean?

A. I mean to say that bonds were substituted for the stocks, yes, sir. [295]

* * *

A. Defendant's Exhibits 30-A and 30-B represent the scheduling of the accounts that United Produce had on our books as of the close of business August 28th, 1948.

Defendant's Exhibit 30-C represents the assignment of those scheduled accounts.

Q. This is a schedule of accounts as of the close of business as of what date, again?

(Deposition of Frederick C. Messenger.)

A. August 28th.

Q. August 28th, 1948? A. Yes, sir.

Q. And I take it, Mr. Messenger, that the practice was in your dealings with United Produce Company to take such an assignment as of the end of each month? A. That is right.

Q. And that assignment would describe the accounts receivable then held by the bank as collateral as of the end of that particular month?

A. That assignment represents the assignment to us of all of the accounts that the United Produce had on their books as of the date indicated.

Q. I see. As of the date that the schedule bears, in this instance, in the instance of Defendant's Exhibit [316] 30-A, August 28th, 1948?

A. That is right.

Q. Now, there is a legend that is written below the total on Defendant's Exhibit 30-B, which is signed on behalf of the United Produce Company. Do you know whose signature that is?

A. Mr. L. D. Rosenthal.

Mr. Erskine: Now, I would like to read that legend into the record because I notice in certain of the other papers it is so faint it is hardly legible, and I will ask you, Mr. Messenger, if this particular legend, that is the legend signed by Mr. Rosenthal, does not read:

"The foregoing names and addresses, the sums and the length of time these sums are shown to be owing exactly describe—"

Q. (By Mr. Erskine): Is that "describe"?

(Deposition of Frederick C. Messenger.)

A. "Describe."

Mr. Erskine: Exactly describe—

Mr. Lasky: Read that again.

Mr. Erskine: "—The foregoing names and addresses, the sums and the length of time these sums are shown to be owing exactly describe and are [317] hereby identified as the indebtedness this day assigned to Merchandise National Bank of Chicago and by this reference are hereby made part of said assignment. Dated this 2nd day of September, 1948."

Q. (By Mr. Erskine): That is a correct reading of the legend, is it? A. Yes, sir.

Mr. Erskine: I do that because in certain of these papers it is quite faint and hardly legible.

Mr. Lasky: It is the same legend provided for in Exhibit 25. [318]

* * *

Q. (By Mr. Erskine): I notice the assignment attached to Defendant's Exhibit 30-A seems to be signed by a man by the name of Oddo. Are you familiar with his signature? [320]

A. Yes; that is Tony Oddo.

Q. I am referring to the signature appearing on Defendant's Exhibit 30-C. Does the signature to the left of Oddo's signature on Defendant's Exhibit 30-C—I take it that is another signature of Rosenthal?

A. That is Mr. L. D. Rosenthal's signature.

Q. Now, in order to be absolutely clear on this—

(Deposition of Frederick C. Messenger.)

I think you may have answered it, but I am not positive—the accounts shown on this schedule Defendant's Exhibits 30-A and B were all of the accounts receivable of the United Produce of that date, that is, August 28th, 1948?

A. It is my understanding that that schedule covered all of the accounts receivable owned by United Produce Company from the people scheduled therein as of August 28th, 1948.

Q. Regardless of the dates upon which the accounts receivable became due to United Produce Company?

A. I believe that to be true.

Q. I will show you these papers, Mr. Messenger, which have been marked 30-A—

Mr. Lasky: Are you through with 30?

Mr. Erskine: Yes.

Mr. Lasky: Let me look at it, please.

Mr. Erskine: Yes. [321]

Q. (By Mr. Erskine): Defendant's Exhibits 31-A to 31-BBB for identification, I will ask you to tell me by way of illustration what the schedule appearing on Defendant's Exhibit 31-A represents.

A. The schedule which is marked as Defendant's Exhibit 31-A represents the accounts pledged as collateral by the United Produce Company for borrowings made that date by the United Produce Company.

Mr. Lasky: "That date," you mean the date it bears?

The Witness: That it bears.

(Deposition of Frederick C. Messenger.)

Mr. Lasky: Let me interpose an objection, again, on the ground the document speaks for itself and explains what it is.

Q. (By Mr. Erskine): Now, Mr. Messenger, I take it that all the other papers in this Exhibit 31-A to 31-AAA are of the same nature as those referred to on 31-A, and in checking over these lists, that is, the schedules are the same, not the assignments— A. May I answer that?

Mr. Lasky: He has not asked a question yet.

Q. (By Mr. Erskine): I would like to have you tell me whether the signatures [322] which these instruments bear are those of Tony Oddo and Rosenthal?

A. You are referring now to both the schedules of indebtedness assigned and also the assignment forms?

Q. Yes; so far as the signature is concerned.

A. These signatures on Defendant's Exhibits 31-A through 31-BBB are the signatures of L. D. Rosenthal and Tony Oddo.

Q. And the schedules included in that exhibit are of the same type as the schedule appearing on 31-A?

A. The schedules are all the same, in the same type as 31-A.

Q. Now, tell me this, Mr. Messenger, these schedules indicate that frequently during the month, almost daily during the month—frequently during the month would be better—accounts receivable were assigned by United Produce to Mer-

(Deposition of Frederick C. Messenger.)

chandise, and at the end of the month a schedule similar to Defendant's Exhibits 30-A and B were prepared indicating the accounts receivable still remaining in existence as of the end of that month; was that the practice?

A. That was the practice.

Q. Now, calling your attention to this Exhibit 31-A, was that schedule, or any schedules similar to that, in [323] this Defendant's Exhibits 31-A to 31-AAA, prepared by the bank itself after a document had been signed in blank by Oddo and Rosenthal?

A. None of the schedules appearing in 31-A to 31-BBB were prepared by any officer or employee of Merchandise Bank.

Q. They were all prepared and signed, they were all complete and signed before their delivery to the Merchandise Bank, and no officer or employee of the bank took part in their preparation?

A. That is correct.

Mr. Lasky: They were in the form in which they now appear at the time the bank got them.

The Witness: They were in the form that they now appear when they were presented to the bank by the United Produce Company.

Mr. Lasky: Except, I suppose, for notations about Exhibit numbers which have been added?

The Witness: Or any little pencil notations.

Mr. Lasky: By the way, why not clear up that Exhibit A that appears in the rubber stamp on those papers?

(Deposition of Frederick C. Messenger.)

Mr. Erskine: I am going to do that right now.

Q. (By Mr. Erskine): There is a mark "Exhibit A" on the papers constituting [324] part of Defendant's Exhibits 31-A to 31-BBB. What does that stamp "Exhibit A" on those papers mean, or indicate? Who put it there?

A. The rubber stamp "Exhibit A" indicates that these papers were filed in the Court in the bankruptcy proceedings of the United Produce Company, in the Bankruptcy Court.

Q. Now, Mr. Messenger, endeavoring to abbreviate this matter as much as I possibly can——

Mr. Lasky: For which we thank you profusely!

Q. (By Mr. Erskine, continuing): —I will call your attention to Defendant's Exhibits for identification 28-A, 28-B and 28-C, and also Defendant's Exhibits for identification 29-A to 29-TT, both inclusive, and I will ask you to state whether or not what you have said with respect to Defendant's Exhibits for identification 30-A, 30-B and 30-C, and Defendant's Exhibits for identification 31-A to and including 31-BBB, is applicable to Defendant's Exhibits 28-A, 28-B and 28-C for identification, and Defendant's Exhibits 29-A through 29-TT, including the identification of the signatures?

Mr. Lasky: Well, now, wait just a moment, please. Will you read that question. I want to be sure I understand [325] it.

(The question was thereupon read by the reporter as above recorded.)

(Deposition of Frederick C. Messenger.)

Mr. Lasky: All right.

A. Defendant's Exhibits for identification 28-A through 28-C, and Defendant's Exhibits for identification 29-A through 29-TT are in the same form, and bear the same signatures, as those appearing in Defendant's Exhibits 30-A through 30-C for identification, and Defendant's Exhibits 31-A through 31-BBB for identification.

Mr. Lasky: Now, just a moment. The question was—

Q. (By Mr. Erskine): In other words, Mr. Messenger, your remarks respecting Defendant's Exhibits for identification 30-A, 30-B and 30-C, and 31-A to and including 31-BBB, are applicable to the other exhibits; is that right?

A. Yes, sir.

Mr. Lasky: And your question includes the fact that they were fully filled out and signed, at the time the bank got them?

Mr. Erskine: That is right.

Mr. Lasky: All right.

Mr. Erskine: That is what I intended. [326]

Mr. Lasky: And the witness' answer to that is "Yes"?

The Witness: Yes.

Mr. Lasky: All right.

Q. (By Mr. Erskine): Now, Mr. Messenger, calling your attention to Defendant's Exhibits for identification 26-A to and including 26-C, and Defendant's Exhibits for identification 27-A, to and including 27-Z, I will ask you if your answer

(Deposition of Frederick C. Messenger.)

is the same with respect to those exhibits as it was with respect to Defendant's Exhibits for identification 28-A, 28-B and 28-C, and 29-A to and including 29-TT?

A. My answer is that they are the same, with—

Q. Your answer is that they are the same, with certain exceptions? A. Yes, sir.

Q. All right. Go ahead.

A. (Continuing): —with the exception that those last exhibits which you have submitted to me, which are Defendant's Exhibits for identification 26-A through 26-C, and 27-A through 27-Z, bear stamps on their reverse, indicating that they have been filed before Austin Hall, Referee in Bankruptcy, under date of July 14, 1949. [327]

Now, may I ask a question off the record?

Mr. Erskine: Certainly.

(At this point there occurred an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Lasky: Is it not enough to say—on the record—that on the back of some of these papers appear filing stamps of the Referee in Bankruptcy? You do not need any more than that, for this case.

Mr. Erskine: No, I am not interested in anything further about that.

Mr. Lasky: Put on in the last few months.

Mr. Erskine: That is right. I am not interested in that.

Q. Now, Mr. Messenger, referring to the De-

(Deposition of Frederick C. Messenger.)

posit Account of the Merchandise National Bank: The statements Defendant's Exhibit 20 for identification show certain items that are marked "CC."

You might take a look at those statements, and would you please tell me what those letters "CC" as appear in the Deposit Account mean?

Mr. Lasky: You are referring to them as a "Deposit Account"?

Mr. Erskine: Statements of the Deposit [328] Account—or, if you prefer another term—

Mr. Lasky: Commercial Account.

Mr. Erskine: All right.

Q. The statements of the United Produce Company Commercial Account show items that are marked "CC" in the credit column.

Will you tell me, please, Mr. Messenger, what those represent, those "CC" items?

A. The items appearing in the deposit column on these statements, Defendant's Exhibits for identification 20-A through 21-E—

Q. Through 21-E, did you say?

A. Yes.

Q. Just a moment.

A. Or rather—wait a moment.

Q. I take it you mean 20-A through 20-FFF, do you not?

A. 20-A—yes—through 20-FFF, I meant to say.

Q. Yes.

A. (Continuing): And Defendant's Exhibits for identification 21-A through 21-E represent a posting symbol that is used by our Bookkeeping

(Deposition of Frederick C. Messenger.)

Department, in indicating credits being entered to this account which arose out of loans, or out of drafts discounted for the United Produce Company. [329]

Q. In other words, as I understand it now, Mr. Messenger, when the bank made a loan to the United Produce Company, the Bookkeeping Department of the Bank would enter the amount of the loan in the credit column on the statement of the Commercial Account, and place before the amount, the abbreviation "CC"; is that right?

A. That is true in the case of loans, yes, sir.

Q. And it is also true that when the bank discounted a draft for the United Produce Company, it would place the amount of the discount in the credit column of the statement of the United Produce Company, and place before the amount, the abbreviation "CC," is that correct?

A. In the case of drafts discounted for the United Produce Company, the credit would be entered in the same way, indicating deposits, and the amount would have the initials "CC" indicated thereon.

Q. Now, were those entries in the credit column of the Commercial Account, which you have just described, of two different types, supported by credit memoranda? A. Yes, sir, they were.

Mr. Erskine: I would like to have you produce all of such credit memoranda, commencing as of July 1st.

(Deposition of Frederick C. Messenger.)

(The witness thereupon produced certain documents.) [330]

Q. (By Mr. Erskine): Do you now have those credit memoranda, Mr. Messenger?

A. The credit memorandums covering the period from July 1st on are here, yes, sir.

Mr. Erskine: I will ask the Reporter to mark these documents as Defendant's Exhibits, beginning with the next Exhibit Number.

Mr. Lasky: Now, just a moment. You want the credit memos to the Commercial Account, covering the "CC" items, do you?

Mr. Erskine: That is right.

Mr. Lasky: Well, all right. It just so happens that there are in there some other credit memos, also.

Mr. Erskine: I would like to have the credit memoranda in support of the entries in the account.

Mr. Lasky: They are not all there; that is, I have taken out two or three slips, for use in another connection.

Mr. Lasky: Yes.

Mr. Erskine: Would you mind putting them back?

Mr. Lasky: No, but I will withdraw them again, of course.

Mr. Erskine: That is all right. Now, the papers which [331] the witness has produced appear to be in five separate groups. I will ask the Reporter

(Deposition of Frederick C. Messenger.)

to mark the credit memoranda for July as Defendant's Exhibits 33-A and the following appropriate numbers; for August, Defendant's Exhibits 34-A and the following numbers; for September, 35-A, and the following numbers; for October, 36-A, and the succeeding numbers; and for November, 37-A, and the following numbers.

(The documents referred to were thereupon marked by the Reporter as Defendant's Exhibits for identification, as follows:

(33-A to 33-MMMM, inclusive.
(34-A to 34-EEEE, inclusive.
(35-A to 35-HHH, inclusive.
(36-A to 36-QQQ, inclusive.
(37-A to 37-MM, inclusive.)

Q. (By Mr. Erskine): Now, Mr. Messenger, I take it that the abbreviation "EC" means the correction of an error, does it not, where it appears on statements of the Commercial Account?

A. "EC" is a designation that is used by our Bookkeeping Department for "Error Corrected."

Q. Now, do you have any memoranda in your files that [332] support those entries?

A. If they happen to be in the deposit column we have them in this group, yes, sir.

Q. When you refer to "This group," I take it you mean the group of credit memoranda which you have before you there; is that correct?

A. Yes, sir; or, if in the check column, then the film, Defendant's Exhibit No. 1 for identification, has pictures of them, a microfilm record of them.

(Deposition of Frederick C. Messenger.)

Q. Now, Mr. Messenger, you have also the abbreviation on the statements of the Commercial Account of "CM." I take it that is a different form of credit memorandum from "CC," and that the papers supporting those entries will be found among the records which you have immediately before you there; is that correct?

A. That is correct.

Q. All right. Now, Mr. Messenger, getting back to this Defendant's Exhibit 23 for identification, with the various letters, 23-A, etc.—it has been mixed up, apparently, in handling, in the micro-filming, and therefore it does not start out here with the number 23-A; but that exhibit, as I recall your testimony in that connection—and again, now, I may be slightly in error, and that is why I am asking you—is your [333] record to the Accounts Receivable assigned to you, and payments made thereon, and other matters which you described here yesterday; is that correct? A. Yes.

Q. Is that right?

A. That is correct, yes, sir.

Q. Now, as you described here the other day, Mr. Messenger, this Exhibit, Defendant's Exhibit 23 for identification, shows in many cases that the withdrawals exceeded the payments, does it not?

A. Yes, sir—that is, the withdrawals of collateral exceeded—

Q. The payments?

A. —the purported payments.

Q. Exceeded the purported payments.

(Deposition of Frederick C. Messenger.)

A. Yes, sir.

Q. Do you have a schedule, or a record, supporting this Exhibit, Defendant's 23 for identification, showing the payments made on account of the Accounts Receivable, and also showing the Accounts Receivable withdrawn for other reasons, and the reasons why such other Accounts Receivable were withdrawn?

Mr. Lasky: Just a moment. May I hear that question again, please, Mr. Reporter? [334]

(The question was thereupon read by the Reporter as above recorded.)

Mr. Lasky: May I ask the relevance of this?

Mr. Erskine: Well, again, we come back to the point I stated a while ago, that all of this examination—or rather, I do not mean to say all of it, but that one of the main points to which this examination with respect to records, is directed, is that the records I believe will show, according to our view, that the Merchandise National Bank either knew or should have known long prior to November 17th that the United Produce Company was engaged in fraudulent transactions, and was using the bank to carry out such fraudulent transactions.

Mr. Lasky: Well, now, wait a moment. This deposition here has been going on, now, for three days, this being the third day, and they have been long days, and we have permitted you, in my own judgment, to wander very far afield.

Now I think that your contention here that the

(Deposition of Frederick C. Messenger.)
bank either knew, or should have known, that it was being defrauded by the United Produce Company, is completely irrelevant in law.

The question now is, how long should this [335] examination be permitted to go forward? In other words, if it is not going to go on forever, I am rather disposed to reserve my objection, and let you go into it.

Mr. Erskine: Well, naturally, Mr. Lasky, I am trying to bring it to a close just as rapidly as I possibly can; but, after all, I have got to get the documents which my auditor tells me are the documents that I require, in order to prove my point.

However, as far as finishing is concerned, I can assure you that I will finish my examination just as promptly as I possibly can.

Mr. Lasky: O.K.; then the witness may produce them for you, but we have all of our objection reserved.

Mr. Erskine: What is the question, please?

Mr. Lasky: You asked the witness to produce certain papers.

Mr. Erskine: To avoid repetition, I would prefer to have the Court Reporter re-read the question.

(The question was thereupon again read by the Reporter as above recorded.)

A. We have a record, which I will secure. Now, covering what period, may I ask?

Mr. Erskine: Commencing as of July 1st. [336]

(Deposition of Frederick C. Messenger.)

Mr. Lasky: Well, now, just a moment. Why do you have to go back to July 1st? I think that this thing is too remote and irrelevant anyway, so why make it more irrelevant and remote by going back to July 1st?

It is only relevant in the last month or so, if you have any point there at all.

Mr. Erskine: I assure you, Mr. Lasky, that we have a point in mind that relates to the general proposition stated a few moments ago. We have utterly no disposition to clutter up this record unnecessarily with exhibits, but we do feel that it is necessary for us to go back to that time.

We are really trying to cut the time down as much as we possibly can.

Mr. Lasky: All right.

(Thereupon certain documents were produced by the witness.)

Mr. Lasky: Now, let us get back to the question again. Will you let me hear the question once again, please, Mr. Reporter?

(The question was thereupon read again by the Reporter as above recorded.)

A. Mr. Erskine, I wish the record to show at this time that I am delivering to you the schedules which [337] you have requested, covering collateral withdrawn, as indicated on Defendant's Exhibits 23-A, and the papers marked with the various letters following, and also the amounts of the pay-

(Deposition of Frederick C. Messenger.)

ments that are likewise indicated on Defendant's Exhibits 23-A for identification, with the various letters.

These records cover the period from July 1st, until November 26th, 1948.

Q. (By Mr. Erskine): You have these papers, as I understand it, separated by months, have you not? A. Yes, sir.

Q. With an elastic around the papers covering each month; is that right? A. Yes, sir.

Mr. Erskine: I will ask the Reporter to mark the papers produced by the witness, covering the month of July, as Defendant's Exhibits 38-A, and the various following numbers; the papers covering the month of August, as Defendant's Exhibit 39-A, and the various succeeding numbers; the papers covering the month of September, as Defendant's Exhibit 40-A, and the numbers following; the papers for the month of October, Defendant's Exhibit 41-A, and the numbers following; and [338] the papers covering the month of November, Defendant's Exhibit 42-A, for identification, and the various numbers following.

(The documents referred to were thereupon marked by the Reporter as Defendant's Exhibits for identification, as follows:

(38-A to 38-HH, inclusive.

(39-A to 39-GG, inclusive.

(40-A to 40-Z, inclusive.

(41-A to 41-CC, inclusive.

(42-A to 42-W, inclusive.)

(Deposition of Frederick C. Messenger.)

Mr. Erskine: Now, I think I have just one or two further questions, and then we will suspend, if that is agreeable.

Mr. Tobey calls my attention, as I understand him, to the fact that these exhibits, Defendant's Exhibits 31-A to and including 31-BBB, for example, show assignments of Accounts Receivable to the Merchandise Bank; but so far as we understand it at the present time, we have no record showing the payments made on account of Accounts Receivable so assigned.

In other words, Mr. Tobey says that as to the papers, for example, marked as Defendant's [339] Exhibits for identification 38-A, and the letters following, the statements of payments and withdrawals on account of Accounts Receivable, the data shown in those papers that I have just mentioned would in the ordinary course of business be posted to some permanent record, and we have not seen the permanent record to which that data would be posted.

Mr. Lasky: Well, Mr. Tobey, of course, is not testifying here.

Mr. Erskine: I understand.

Mr. Lasky: If you have a question to direct to the witness, I suggest that you ask it.

Mr. Erskine: I am asking the witness whether or not he has such a record.

Mr. Lasky: Will you read counsel's statement, Mr. Reporter.

(Deposition of Frederick C. Messenger.)

(The record was thereupon read by the Reporter, as above recorded.)

Mr. Lasky: Well, now, let me say, in the first place, that you do not have any identification in the record of what Defendant's Exhibits for identification 38 to 42, with the accompanying letters are.

Mr. Erskine: I stated that those exhibits, as I understand it, are the memoranda of Accounts Receivable [340] withdrawn, and payments on account of Accounts Receivable.

The question that I am now putting to the witness is whether or not he has any permanent record, based upon such memoranda, showing such payments and such withdrawals.

Mr. Lasky: Well, in the first place, I think that you ought to ask the witness what Defendant's Exhibits for identification 38 to 42, inclusive, are, and not try to tell him what they are.

Q. (By Mr. Erskine): Mr. Messenger, what are Defendant's Exhibits 38-A to 42-A with the following letters, both inclusive?

A. This Exhibit, 38-A, for example, which I have before me, represents the withdrawals, or payments received on collateral; and it also indicates the amount of the payments received on collateral, so withdrawn or paid.

Q. It represents, as I understand it, payments received by the Bank on account of the assignments of Accounts Receivable—on account of Accounts

(Deposition of Frederick C. Messenger.)

Receivable assigned to the Bank, that is, and withdrawals of such Accounts Receivable; is that correct? A. Yes, sir. [341]

* * *

Q. Who is Mr. Tague?

A. Mr. Tague is an employee of the bank, and he did outside auditing for us.

Q. Is he an officer of the bank?

A. No, he is not.

Q. Who is Mr. Rudolph?

A. Mr. Rudolph is an Assistant Vice-President and was on that date and is directly in charge of the Credit Department.

Q. Is Mr. Tague still in the employ of the bank?

A. Yes, he is.

Q. He was engaged in the business as you have described, in November and October of 1948?

A. That is right.

Q. Mr. Rudolph was an Assistant Vice-President in October and November of 1948?

A. That is right.

Q. And still is an Assistant Vice-President and in the employ of the bank? A. Yes, sir.

Q. Did you say that Mr. Rudolph was in charge of the Credit Department of the bank?

A. That is right.

Q. Subject, I suppose, to the control and direction and [362] supervision of the Executive Officers, the Vice-Presidents of the bank, the Loaning Officers?

(Deposition of Frederick C. Messenger.)

A. Subject to, rather, I should say, he works in conjunction with the Loaning Officers of the bank.

Q. Mr. Rudolph as the head of the Credit Department of the bank had knowledge of this United Produce Company account?

Mr. Lasky: Just a moment. That calls for a conclusion of this witness to what someone else knew.

Mr. Erskine: All right.

Q. (By Mr. Erskine): Now, I notice on here at the bottom of this sheet, Defendant's Exhibit 44, some handwriting which is dated, apparently, October 2nd. Whose handwriting is that?

A. Mr. LeRoy's handwriting. [363]

* * *

Mr. Erskine: Read it.

Mr. Lasky: Similar in form to what you have there in the left margin. It says:

"Discount Committee action 2-26-48." Typewriting, "HJR FWR."

In the body it has the following:

"Discount Committee approved an increase in their Customer's Draft Line to \$200,000. This is in addition to the \$200,000 line on the assignment of all their accounts receivable on which we have as additional collateral \$40,000 in Government Bonds owned by Mr. Rosenthal, and \$8,700 in cash arising out of freight claims. The line is to be reviewed in 90 days."

(Deposition of Frederick C. Messenger.)

Here is the little memo. I guess that comes within what you are asking for.

Mr. Erskine: Mark that, please, as Defendant's Exhibit 47 for identification. [367]

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 47, for identification.)

Q. (By Mr. Erskine): Now, let me ask you a question about this, Mr. Messenger, while I have it here. I am referring to Defendant's Exhibit 47, which is a memorandum prepared by Mr. Reichwein to Mr. Royds, is that right?

A. That is not correct. This is a memorandum that Mr. Royds prepared and delivered to Mr. Reichwein.

Q. Oh, yes. Who is Mr. Royds?

A. Mr. Royds is an Assistant Vice-President.

Q. Was he at that time and in October and November, 1948? A. Yes, he was.

Q. And is he still? A. He still is.

Q. What is his department of the bank?

A. At that particular time he was Manager of our Discount Department, Discount Cage, I might say.

Q. The Discount Cage is the cage at which drafts are discounted, is that right?

A. No, sir. The Discount Cage is where notes are handled.

Q. Now, what do you call the cage at which drafts are [368] discounted?

(Deposition of Frederick C. Messenger.)

A. Those are handled through our collection cage.

Q. Who is in charge of your collection cage?

A. Mr. Koefoot.

Q. That was true in October and November, 1948? A. That is right.

Mr. Erskine: Are there any other such inter-office communications?

Mr. Lasky: Here is something.

Mr. Erskine: Mark this as Defendant's Exhibit No. 48 for identification.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 48 for identification.)

Q. (By Mr. Erskine): I will show you Exhibit 48. I take it that was prepared by Mr. Reichwein. To what classification does a memorandum of that sort belong? Is it part of your credit file, or is it part of some other credit file?

A. This is a memorandum, that is a part of our credit file—Defendant's Exhibit 48.

Mr. Lasky: What is the date of it?

Mr. Erskine: It is dated 4-7-48.

Are there any other such papers? [369]

Mr. Lasky: Here is a sheaf of seven auditor's reports, apparently monthly.

Mr. Erskine: With respect to United Produce Company?

Mr. Lasky: Yes. You better submit them to the witness and get him to identify them.

(Deposition of Frederick C. Messenger.)

Mr. Erskine: Mark these as Defendant's Exhibits 49-A and following for identification.

(The documents referred to were thereupon marked by the Reporter as Defendant's Exhibits 49-A to 49-G, both inclusive, for identification.)

Q. (By Mr. Erskine): I show the Exhibits 49-A to G, inclusive, and I will ask you to state what those papers are?

A. Defendant's Exhibits 49-A through 49-G represent reports made by Mr. W. E. Tague, one of our auditors, covering the audit and inspection of the books of the United Produce Company on the dates indicated on each one of these reports.

Q. Mr. Tague, you say, was one of your auditors? A. That is correct.

Q. One of his jobs was to make a periodic audit of the books of the United Produce Company?

A. That is correct. [370]

Q. And these papers, Exhibits 49-A to 49-G, disclose the results of his examination, is that right?

A. That is right.

Q. Were there any other reports made by Mr. Tague with respect to his audits of the books of the United Produce Company, other than these sheets I have just mentioned?

A. I know of none other.

Q. Would your knowledge be complete on that? You suggest that there might be some that you might not know of?

(Deposition of Frederick C. Messenger.)

A. The procedure is that those are the type of reports that he would make.

Mr. Lasky: I have in my hand here, taken from the same file, a memorandum by Mr. Tague—it isn't on that form, but I will produce it. I don't know whether it would be called an auditor's report or not.

Q. (By Mr. Erskine): I would like for you to tell me about these initials in the right-hand upper corner of these auditor's reports. I take it that these auditor's reports are submitted to the officers, to each of the officers represented by the separate initials, for his perusal and initialling, is that right?

A. The initials in the upper right-hand corner of these exhibits would indicate that those particular [371] officers had seen these reports and reviewed them.

Q. And that includes Mr. Reichwein, the first initial? A. Mr. Redheffer.

Q. Mr. LeRoy, the second initial, Mr. Reichwein, the third—who is five? A. Mr. Cottle.

Q. Who is six? A. Mr. Royds.

Q. Do you have some other memorandum of Mr. Tague?

Mr. Lasky: Yes.

Mr. Erskine: May I see it?

Mr. Lasky: Yes.

Mr. Erskine: I ask that this be marked as Defendant's Exhibits 50-A and 50-B.

(Deposition of Frederick C. Messenger.)

(The documents referred to were thereupon marked by the Reporter as Defendant's Exhibits Nos. 50-A and 50-B, for identification.)

Q. (By Mr. Erskine): This is a memorandum from Mr. Rudolph to Mr. Tague dated January 26th, 1948, and I take it that that is what it was? (Indicating Defendant's Exhibits 50-A and [372] 50-B.)

* * *

Q. (By Mr. Erskine): Now, Mr. Messenger, calling your attention to Exhibit 40, which is marked 40-A to 40-Z for identification. As I recall your testimony that Exhibit, that group of Exhibits, represents the memoranda upon the basis of which entries were made in the exhibit marked Defendant's Exhibit 23-A to M, inclusive, showing the payment on account of Accounts Receivable Collateral, and the withdrawals of such collateral.

A. Defendant's Exhibits 40-A through 40-Z cover the supporting record in which entries were made in the account as reflected, the record as reflected in Defendant's Exhibits 23-A through 23-M.

As I stated before the first column represented the withdrawal, or collateral eliminated, and the last column represented the purported payments on the collateral that was eliminated by those purported payments.

Q. Did either the entries on these memoranda represent either payments made on account of col-

(Deposition of Frederick C. Messenger.)

lateral eliminated [385] or collateral withdrawn for other purposes?

A. Purported payments on collateral eliminated or collateral withdrawn for other purposes.

Q. For other reasons, I suppose I should say, for other reasons than payment.

A. I don't exactly get your question.

Q. Instead of "for other purposes," I should have said. "Withdrawn for other reasons" than payment. That would be a correct statement, wouldn't it? A. For other—

Q. Collateral withdrawn for other reasons—

Mr. Lasky: I think the testimony is clear enough already.

Q. (By Mr. Erskine): —than payment.

A. That is correct, yes.

Q. I would like to have you tell me what these initials and writing mean in these various columns. I call your attention to the second column in Exhibit 40-A. What is the writing at the head of that column? What does that mean? What does it say and what does it mean?

Mr. Lasky: That is Gassman's handwriting.

A. That represents the credit of Accounts Receivable as it relates to the collateral account appearing on [386] Exhibits 23-A through 23-M.

Q. (By Mr. Erskine): Credits to accounts receivable, you said, as it appears on the Exhibit you mentioned?

A. Collateral Account, yes. That is the with-

(Deposition of Frederick C. Messenger.)

drawal. That represents the withdrawal of those various items from collateral.

Q. What are the words there?

A. "Credit Accounts Receivable." That is a memorandum or heading that was given to that form by the United Produce Company themselves, because that represents their sheet that they delivered to us.

Q. Oh, I see.

Mr. Lasky: Doesn't that read, "Cr. Accts. Rec."?

The Witness: Oh, yes.

Mr. Lasky: That I would interpret as Credit to Accounts Receivable?

Mr. Erskine: Yes.

Q. (By Mr. Erskine): What is at the top of the column to the right?

A. The heading as indicated as, "D" drafts—"D"—"drafts disc. M.N.B." indicating that the amount appearing in there represents drafts discounted with the Merchandise National Bank, the amount representing the total of the items appearing in that first column, which bears [387] the word, the abbreviations of "Credit Accounts Receivable."

Q. You say it is the total of certain items in the first column?

A. Total of the first two items, one being \$5,195 and the second item being \$808.75. The total of those two items which appear in the column with the abbreviation "Credit to Accounts Receivable"

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equal the \$6,003.75 appearing in the column with
the abbreviations are "Drafts Discounted Mer-
chandise National Bank."

Mr. Lasky: Referring now to the face of Exhibit 40-A for identification.

The Witness: That is correct.

Q. (By Mr. Erskine): Still referring to that same paper, why is it that there is not a similar entry made in the column headed "Drafts"?

Mr. Lasky: This is drafts, "D."

Q. (By Mr. Erskine): This is drafts?

A. Discounted.

Q. Drafts discounted. Why is there not a similar entry in that column to this \$6,003.75 with relation to the items appearing in the column to the left below [388] the figure \$808.75?

A. The items appearing in the column with the abbreviation of "Credit Accounts Receivable" below the \$808.75 just previously discussed, those items are items in which we receive purported payments, and the total of those items between \$313.20 and \$1,256.00, total \$31,895.91, which we have an indication in the third column marked "D Notes Payable M.N.W."—there is that total which I have just indicated in that column.

(Indicating.)

Q. "M.N.B."?

A. "M.N.B.," that is, instead of "M.N.W."

That total is \$31,895.91, which is the purported payment which has been posted to the ledger which

(Deposition of Frederick C. Messenger.)
is indicated as Defendant's Exhibits 23-A through
23-M.

Mr. Erskine: Let me see if I understand that.

Q. (By Mr. Erskine): The items which have this total of \$31,895.91 are payments on account of what you call, purported payments of, on account of what you call "Collateral"?

A. That is correct.

Q. Whereas the first two payments in the Credit Accounts Receivable column, \$5,195.00 and \$808.75 are payments on account of drafts, is that [389] right?

A. No, it is not payment on account of drafts. It is a withdrawal of those items from the Accounts Receivable Collateral Account, and that drafts were drawn in those amounts.

Q. It is a withdrawal of Accounts Receivable and drafts withdrawn in those amounts. Do I understand for that the drafts were substituted for the Accounts Receivable? I am just trying to understand it.

A. No, sir; the drafts were not substituted for Accounts Receivable.

We, according to our records appearing on Defendant's Exhibits 23-A through 23-M had excess collateral insofar as the amount of that collateral account over the amount of Notes Payable and they represented a withdrawal of collateral.

Q. Why was it headed "Drafts"? That is the thing I don't understand; drafts discounted. Why did the withdrawal of collateral—

(Deposition of Frederick C. Messenger.)

Mr. Lasky: Maybe I could clarify it.

Mr. Erskine: Go ahead.

Mr. Lasky: Is it a fact, Mr. Messenger, that after some of the excess collateral was withdrawn as collateral for Notes Receivable, Notes Payable to the bank, in some instances that collateral, being invoices, delivery orders [390] and the like, were attached to drafts and drafts discounted with the bank? A. That is correct.

Q. (By Mr. Erskine): That is what that item \$6003.75 represents?

A. That represents those accounts being withdrawn from collateral were drafted by United Produce Company on the—

Q. Purchasers?

A. —purchasers from them. But, those drafts might have been entered in the, those drafts might have been purchased that day or a previous or subsequent day.

Q. I see. But, at any rate, it means that those accounts were withdrawn and were later, as you expressed it, drafted?

A. Later, or maybe a few days before that.

Q. Either before or after the date of the entry, drafted? A. That is correct.

Q. That draft discounted with the Merchandise National Bank? A. Yes, sir.

Q. Glance over the papers in the group Defendant's Exhibit 40-A and tell me if what you have just said [391] about that 40-A applies to the other papers, will you, Mr. Messenger?

(Deposition of Frederick C. Messenger.)

The Witness: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Q. (By Mr. Lasky): Are you ready?

A. I am ready.

Among the Exhibits 40-A through 40-Z, in answer to your question, all of them are the same type of record, and were used for the same purpose, with the exception of Defendant's Exhibit 40-B, 40-L and 40-Z.

Q. Will you describe those exceptions?

A. Defendant's Exhibit 40-B represents a record of the entry that was put through on September 2, 1948, in which a new loan for the maximum amount of \$200,000, and the schedule of accounts on the books of United Produce Company, were pledged as collateral.

Q. In other words, that was a memoranda upon which entries were made in Defendant's Exhibit 23, on which there was a summing up, the total amount of the debt was shown, and the total face amount of the collateral securing that debt was shown, is that right? [392]

A. That is the entry which—

May I ask the Reporter to read back one statement where I mentioned the \$200,000?

(The answer was thereupon read by the Reporter as above recorded.)

The Witness (Continuing): On that I would

(Deposition of Frederick C. Messenger.)

like to make a change. That represents the posting medium of paying off the note of \$200,000, the loans that were due, and not a new loan.

It also represents the bookkeeping entry covering the withdrawal of all the Accounts Receivable pledged, and which was substituted with a new schedule as of that date.

Q. (By Mr. Erskine): And that, you would call it a posting entry—that was posted in Defendant's Exhibit 23?

A. That was posted on Defendant's Exhibit 23-J the postings appear.

Q. Would you mind telling me about the other exceptions as promptly as you can?

The Witness: Off the record.

(There occurred at this point a further informal discussion, outside the record, which was not recorded by the Reporter.) [393]

The Witness (Continuing): Defendant's Exhibit 40-M, which is stapled to Defendant's Exhibit 40-L, that represents debit memorandums and credit memorandums submitted to us by the United Produce Company to bring the Collateral Account in balance, our record on the Collateral Account in balance with their books.

This happens once or twice a month, but always on the last day of the month.

Defendant's Exhibit 40-Z is the same as Defendant's Exhibit 40-M.

Q. (By Mr. Erskine): With those exceptions,

(Deposition of Frederick C. Messenger.)

Mr. Messenger, I take it that your remarks applicable to the first page in this group of forty are applicable to the other papers in that group?

A. In the review of them it would appear to me that they are applicable, all applicable to the same statement.

Q. Now, I wonder if you would review, as promptly as you can, in the same way, Defendant's Exhibits 38, 39, 41 and 42, that is, those exhibits as groups.

A. I have reviewed Defendant's Exhibits under series Nos. 38, 39, 41 and 42, and in general they are in the same form as that which appeared under Exhibits numbered 40. [394]

I would like to draw your attention to the fact that some of these exhibits in all of these series do not carry three columns of figures with the middle column of drafts discounted M.N.B., do not appear on some of these exhibits.

Q. That is for the reason that no receivables were drafted, to use your expression?

A. That is correct.

Q. In the case of these exhibits?

A. That is right.

Now, there are on Defendant's Exhibit 42-S, there are figures as originally submitted to us that have certain notations entered on them. There is a bracket after three figures indicated in the amount of \$48,726.50, \$39,412.70, and \$17,210.72, with a notation, "Not put through."

Those checks, checks covering those three items

(Deposition of Frederick C. Messenger.)

were received by Merchandise National Bank on November 17th and not put through to any records.

There is an item appearing, \$851.75, with a notation, "This check put through November 18," which was the date in which that entry was consummated on our books.

Q. That last item is on the same page, [395-396] 42-S? A. 42-S.

Defendant's Exhibits 42-U and 42-V cover checks received by the Merchandise National Bank from the United Produce Company and application was made of those amounts in reduction of the Notes Payable Liability to Merchandise National Bank.

Q. And I believe that it appeared, I think it was said by somebody during the discussion of these last exhibits—I better give you the numbers—the group marked 40, 38, 39, 41 and 42, the papers in those groups were prepared by the United Produce Company and filed with the Bank?

A. With the exceptions that I have brought to your attention, all of those were delivered to the Merchandise National Bank in that form.

Q. Yes.

A. In their form with, perhaps, any little notations that might have been put on there by our bank.

Q. In the handwriting of what employee of the United Produce Company do those papers appear, do you know?

(Deposition of Frederick C. Messenger.)

A. I don't know how I should answer that.

Mr. Lasky: Answer if you know.

Q. (By Mr. Erskine): I asked if you knew the handwriting—that is the [397] question.

A. I do not have any knowledge, only hearsay knowledge, as to whose handwriting it is.

Q. All right. But, it is in the handwriting of some employee or officer of the United Produce Company? A. That is correct.

Q. Now, Mr. Messenger—

Mr. Lasky: If you compare it with the handwriting of Mr. Gassman identified as his own last night, and other documents, you will see that it is in Gassman's handwriting.

Mr. Erskine: I can't say. I don't know.

Q. (By Mr. Erskine): Now, before we proceed to these other exhibits that were marked during the adjournment of these depositions I would like to ask you this: As indicated by the exhibits we just mentioned, 38 to 42, inclusive, those groups, payments were made from time to time on account of the collateral held by the Merchandise National Bank, that is, the assignment of the Accounts Receivable held by it, that is correct, is it not?

A. Purported payments were received by Merchandise National Bank.

Q. Let me see if I am correct in this understanding, [398] and I may not be, but I will state it in order to try to save a little time: In order to determine the source of those payments, that is, the persons making the payments and the method

(Deposition of Frederick C. Messenger.)

by which the payments were made, that is, either cash or checks, and the banks upon which such checks were drawn, it would be necessary, would it not, Mr. Messenger, to examine the blotters and other memoranda in the Collection Department of the Bank, and that such an examination would disclose the source of the payments?

Mr. Lasky: Hold on a moment. Will you read the last question?

(The question of counsel was thereupon read by the Reporter as above recorded.)

Mr. Lasky: O.K.

Q. (By Mr. Erskine): If there is no objection I would like to change that "Collection Department" to "Discount Department," is that right?

A. That is not a complete, true statement.

Q. Will you complete it for me? I want to find out how we can determine the source of those payments in the event we determine, we decide to determine such source. [399]

A. Defendant's Exhibits Nos. 38 through 42 show the names of the persons whose checks were delivered to the Merchandise National Bank, and that is the only record maintained by Merchandise National Bank of the names of persons who were the drawers of the checks presented to us.

Q. Now, can you, by looking at these Exhibits, Defendant's Exhibits 38 through 42, those groups, can you state that the names of the persons appearing in the left-hand column of these sheets,

(Deposition of Frederick C. Messenger.)

can you state that the payments represented on those sheets consisted of checks of the persons named in the left-hand column of those sheets?

A. On Defendant's Exhibits 38 through 42 the names indicated on the left-hand column are the names of the drawers of the checks submitted to us in payment.

Q. Isn't it a fact that those are the names of the debtors of the Accounts Receivable assigned to the bank, and not the names of the drawers of the checks constituting the payments?

A. It is the name of the drawer of the check as well as the name of the Account, that is—

Q. The debtor?

A. —that is being paid. [400]

Q. Are you prepared to state positively at this time, Mr. Messenger, that all of the Accounts Receivable assigned to the bank during the period covered by these exhibits 38 to 42 were paid by the checks of the debtors whose accounts, whose obligations to the United Produce Company were signed at the Merchandise National Bank?

A. No, sir; I am not in a position to make that statement because we operated on a general assignment basis and we did not stamp off payments against accounts pledged.

Q. And so your previous statement that these sheets, 38-A to 42, would show not only the names of the debtor, but the names of the persons drawing the checks constituting the payments indicated on

(Deposition of Frederick C. Messenger.)

those sheets, is not, to speak with deference, correct?

A. No; the statement that I made that the names appearing on the left-hand column were the names of the drawers of those checks delivered to Merchandise National Bank, and they were indicated as payments of accounts of those same names that were purported to have been pledged to Merchandise National Bank.

Mr. Erskine: It is quite obvious to me that we don't understand one another. Answer this question: [401]

Q. (By Mr. Erskine): Do you or do you not know that the payments shown on Exhibits 38 to 42, inclusive were made by the checks of the debtors whose names appear upon those statements?

A. The names appearing on Schedules 38 through 42 were the names of the drawers of the checks that were presented to Merchandise National Bank, and also that were purported to have paid Accounts Receivables pledged in those same names.

Q. Now, this may be important to us, so I have to pause and try to get the thing straightened out in my own mind. Let us take, for example, the Sheet 38-A. That has on the left-hand column certain names, does it not? A. Yes, it does.

Q. Let us call those, the persons and firms so named, the debtors for convenience—you understand that? That is the term that I will use to refer to those people you understand that, do you?

A. Yes, sir.

(Deposition of Frederick C. Messenger.)

Mr. Lasky: You say the "debtors"?

Mr. Erskine: Debtors.

Mr. Lasky: Why not call them "Account Debtors" to distinguish them from the United Produce Company, which was the debtor of the bank?

Mr. Erskine: All right, we will call them "Account [402] Debtors."

Mr. Lasky: Is that term one that has been used, Account Debtors?

The Witness: That is o.k.

Q. (By Mr. Erskine): And I will ask you this question, then: Are you prepared to state that each of the Accounts of the Debtors indicated on Defendant's Exhibits 38-A drew his own check for the amount of the payment posted to his name in payment of his particular Account and that that check was delivered to the Merchandise Bank?

Mr. Laskey: I object to that, because it assumes something not in evidence. It assumes that the so-called Account Debtor whom the witness has testified drew the checks also had a debt to United Produce Company which had theretofore been pledged to Merchandise National Bank; in other words, for the record, Mr. Erskine, I think the situation as testified to by the witness is clear, if you don't mind my trying to explain it.

Mr. Erskine: Go ahead and explain it. It is not clear to me.

Mr. Lasky: The witness has testified point blank that the checks received by the Bank as

(Deposition of Frederick C. Messenger.)
shown on those sheets are the checks of the persons whose names there appear— [403] correct, Mr. Messenger?

The Witness: Yes.

Mr. Lasky: He has also testified that they purport to be checks of those same people in payment of debts of theirs previously assigned to the bank as collateral—correct?

The Witness: Purported, yes.

Mr. Lasky: He has testified further, as I understand it, whether or not they were from people who had previously, whose accounts had been previously pledged, he doesn't know.

Q. (By Mr. Erskine): Is that right?

A. Yes.

Mr. Erskine: That third point is the one I can't reconcile with the first two.

Mr. Lasky: He has further testified that since they were taking general assignment of receivables they never concerned themselves with the question whether, when a check came into them for the payment of the debt, it did or did not come from somebody whose debt had been pledged with them, they didn't care where the funds came from.

Mr. Erskine: That is the way I understood his testimony. [404]

Q. (By Mr. Erskine): Is that last statement correct? A. That is correct.

Q. That is the way I understood your testimony and that is what occasioned, or gave rise to the confusion in my mind. To repeat as well as I can

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the statement made by Mr. Lasky, the statement last made, my understanding is that when a payment on account of Accounts Receivable came into the bank, that is, Accounts Receivable pledged by United Produce Company to the bank, came into the bank, the bank did not pay any attention to whose check that was, did it?

A. Yes, it did pay attention to whose check it was, it was checked back against these Defendant's Exhibits we are discussing, 38 through 42, but we did not check it back against Schedules of Accounts previously assigned to us.

Q. In other words, when you got Exhibit 38-A, for example, listing six names, you got at the same time checks of those six people in the amounts specified on Exhibit 38-A, and you checked the checks against the names on 38-A and made sure that the checks with the payments indicated on 38-A were made by the checks of those Account Debtors, is that correct? [405]

A. That is correct, if there are six names on that schedule.

Mr. Lasky: May I ask one question at this point?

Mr. Erskine: Yes, that is all right.

Mr. Lasky: Mr. Messenger, when these checks were received were they payable to this bank, or were they payable to the United Produce Company and endorsed to this bank by United Produce Company?

The Witness: They were payable to the United

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Produce Company and endorsed to the Merchandise National Bank.

On Defendant's Exhibit 38-A, in the items we are talking about, there are five names, four names.

Q. (By Mr. Erskine): Four names?

A. These four. (Indicating.)

Q. Oh, I see; four names, the last four are the ones about which we are talking, is that correct?

A. That is correct.

Q. One of these names is, as I read it, La Mantia Brothers.

A. That is La Mantia Brothers.

Q. When this Defendant's Exhibit 38-A was brought into the bank there was brought with it a check of the La Mantia Brothers for \$506.17 payable to the order of [406] the United Produce Company and endorsed by the United Produce Company to the bank, is that right?

A. Without referring to the schedule, if the information you have read off is correct, that is correct.

Q. Just check the information that I have read.

A. "La Mantia Brothers, \$506.17." We did receive such a check.

Q. Can you say that without referring to the schedule? A. Yes, I can.

Q. Your testimony in that respect is the same for the other papers, I take it, and the other items in these papers, 38-A to 42, is that right?

A. It is true with the exception of those exceptions we spoke about in the first place.

(Deposition of Frederick C. Messenger.)

Mr. Lasky: Read the last couple of questions and answers.

(The questions and answers referred to were thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): Now, Mr. Messenger, certain exhibits, credit memoranda, as I understood, were marked yesterday, rather they were marked during the adjournment of this deposition after it was adjourned yesterday, they were marked [407] during the adjournment, and I would like to go over them with you at this time. The groups are marked Defendant's Exhibits 33, 34, 35, 36 and 37.

As I understood what you said yesterday those groups all constitute the credit memoranda upon the basis of which entries were made in the commercial account of the United Produce Company?

A. They represent, Defendant's Exhibits 33, the groups of numbers, 33 to 37, are credit memoranda prepared by Merchandise National Bank, and deposit tickets prepared by the United Produce Company, covering entries in the United Produce Company Account on the books of Merchandise National Bank in the Commercial Bookkeeping Department.

Q. And they are reflected in the Commercial Bookkeeping Department, and they are reflected in the Account which has been introduced in this case, to which we referred as the United Produce Company Commercial Account, is that correct?

A. That is correct.

(Deposition of Frederick C. Messenger.)

Q. So that we can understand these items, we have here an instrument marked 33-A, and up in the left-hand corner there is the word "Credit." Then the first column is entitled "Maker or Endorser," and there are other entries. [408] Will you explain what those entries mean?

A. Defendant's Exhibit 33-A covers a transaction entered on the books of the Merchandise National Bank in the Account of the United Produce Company, Commerical Account, on July 1, 1948. 1948.

It is a form that was prepared in the office of United Produce Company, and is listed thereon three drafts which United Produce Company drew on the "First National source."

After the name "First National source" appears letters and numbers which are, which purport to represent the car in which this merchandise was shipped, and in the column marked "Amount of Item" is listed the amounts of the drafts which were presented to the Merchandise National Bank for discount, and our bank discounted these drafts for United Produce Company on July 1st, and the total was \$6,358.53.

Appearing on this slip is an impression of a rubber stamp "Collection Teller" July 1, 1948.

Q. The collection stamp indicates the date of receipt, does it?

A. It indicates the date of receipt and by whom received; also by whom entries were made.

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Q. Where is the indication of the person making the [409] entries?

A. The impression of the rubber stamp "Collection Teller, July 1, 1948," indicates that it was made in that department.

Q. Let us take the next paper appearing in this group, 33-B. That seems to be a somewhat different form from 38-A. Would you mind explaining that form to me?

A. Defendant's Exhibit 33-B represents a record that was prepared in the Discount Teller's Department on July 1, 1948, and it represents the Acceptance from the United Produce Company of their note which is due on August 6, 1948, in the amount of \$19,747.07, which is to bear the interest rate of 5 per cent and a service fee of 2 per cent, and the collection of such interest and service fee to be on a to-follow basis.

The total credit entry to the account of the United Produce Company in the Commercial Account was \$19,747.07, and was made on July 1, 1948. There is an indication in the lower left-hand corner that it is a new loan, meaning a new note taken. It bears the initials of "H.W.," the teller who made out this ticket.

Q. The line drawn through the little square in the left-hand corner indicates that it is a new loan? [410]

A. A new note.

Q. A new note. And the words "To Follow" mean that the payment of the interest and the service charge are to follow, is that right?

(Deposition of Frederick C. Messenger.)

A. That is correct.

Q. Now, you said that 33-A was made out in the office of the United Produce Company. Is the same thing true of 33-B?

A. One of the first statements that I made in answer to your question that that was a record prepared by an employee of the Merchandise National Bank.

Q. I see.

A. I did not use those words, but that was the intent.

Q. I see. That got by me. Of course, this next item, 33-C, is just a deposit ticket of the United Produce Company indicating a deposit to the account?

A. That is a deposit ticket prepared and delivered to us in its form by United Produce Company with the exception that we have indicated thereon certain memoranda and have impressed our paying teller's stamp.

Q. Going through this group, all marked 33, I came across this paper marked 33-P, and I will ask you to explain that to me, Mr. Messenger.

A. Defendant's Exhibit 33-P is a form prepared in the [411] bank by the collection teller on July 8th, 1948, and it covers an offsetting of a charge we previously had made covering a check which had been previously received by Merchandise National Bank in the amount of \$35,000 from the United Produce Company and was returned unpaid, at which time the \$35,000 plus perhaps pro-

(Deposition of Frederick C. Messenger.)

test fees, if any, were charged against the Commercial Account of United Produce Company.

It indicates that the item had been again handled, and this is the credit on the handling of that item the second time.

Q. In other words, the United Produce Company made a deposit of a check and had been given credit for \$35,000, and the check had been returned unpaid, whereupon you charged its account and then later the check was again presented and paid, and thereupon the bank prepared this 33-P and a credit was entered to the account?

A. I cannot state, without having reference to back records whether or not that was an item that was deposited by the United Produce Company in Merchandise Bank, or whether it was an item that had been received in payment of Accounts Receivable. Without referring back, I cannot answer that question.

Q. Yes. [412]

A. But I can state that it is an item which we had previously credited United Produce Company in one of their operations with us, which was returned unpaid, and it was later again sent us for payment, and that represents the credit.

Q. Do you know whose check that was?

A. From that record, I cannot tell you.

Q. Is there any record from which you can tell?

A. If it was a deposited item we have no way of finding out except by tracing. If it is an ac-

(Deposition of Frederick C. Messenger.)
counts receivable item, we would find it on one of
these schedules.

Q. I wonder if you would mind making that
tracing and checking the schedule for the purpose
of determining whose check that was?

A. That tracing would take anywhere from five
days to maybe a month, because it has to be done
by correspondence.

Mr. Lasky: Well, of course, we are not going
to trace it. We are under no duty to do that, but
if he can find it by looking at records the bank
has here, it is all right with me to do so.

Q. (By Mr. Erskine): Would you do that, Mr.
Messenger? Would you make a note of that? [413]

A. All right.

Q. I would like to show you a paper here
marked 33-Z and ask you to describe what that
represents.

A. Item 33-Z bears the date of July 10th, 1948,
and covers the correction of an entry made on
July 8th, whereby a collection of a draft on Feld-
baum was advised to us by telephone as one amount,
and when we received the Advice we received the
advice of a different amount, and this is an adjust-
ment of a \$3.00 error.

Q. Just in closing, I call your attention to No.
33-HHHH. I notice there is a straight line drawn
through "New Loan" in the left-hand lower cor-
ner, and a cross drawn through "Renewal" in the
little box marked "Renewal" to the right of the
little box marked "New Loan."

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A. Before I could answer that question I would like to look at another exhibit.

Q. All right.

A. Defendant's Exhibit No. 33-HHHH covers a new loan, which is so marked. The mark under "Renewal" apparently is an error.

Q. Now, in an effort to abbreviate this, as far as I am able, I will ask you, Mr. Messenger, if generally speaking I am not correct in this statement: That with the exception of special memoranda for credits similar to [414] 33-P, all of the papers in this group of exhibits marked 33 are papers similar to 33-A which shows the discounting of certain drafts, or 33-B which shows the execution of a note representing a new loan by the United Produce Company to Merchandise, or 33-C which represents an ordinary deposit ticket?

Would you mind going over that, and also—well, answer that question first for me.

A. In general what you state is correct. The exception is that tickets in the form of 33-P, in the same form as Defendant's Exhibit 33-P, would carry a particular explanation of what that credit was made for.

Q. Yes, but outside of that little statement you have just made, what I said was correct?

A. I think I would like to just take a quick look at them.

Q. Yes. I think you had better look at them.

A. That is correct. [415]

(Deposition of Frederick C. Messenger.)

Q. (By Mr. Erskine): Now, Mr. Messenger, would you tell me what the amount of the Merchandise Bank's capital stock actually paid in and unimpaired plus its unimpaired surplus fund was during the year 1948?

Mr. Lasky: Just a minute. We reserve, of course, our objection to materiality and relevancy, but the witness may answer.

A. The capital stock of the bank issued and outstanding all during the year 1948 was \$1,000,000, and the surplus fund of the bank during that same period was likewise the sum of \$1,000,000.

Q. That was the capital stock not only issued and outstanding, but actually paid in and unimpaired during the year, is that right?

A. From the standpoint of our records it is paid in and unimpaired. [424]

Q. And that was the condition throughout the year and as of December 31st, 1948?

A. That is true.

Q. You mentioned your surplus fund during the year. I take it that was the amount of your surplus fund, namely, \$1,000,000, during the year 1948 and as of the end of the year 1948?

A. That is correct.

Q. Now, if you recall, Mr. Messenger, the other day when we were going over the group of exhibits marked with the number 24 relating to the drafts, you gave certain testimony with respect to the first sheet, or rather the face of the sheet included in

(Deposition of Frederick C. Messenger.)

that group and marked 24-A, and I requested you to make an examination of the other sheets in that exhibit in order to tell me whether or not the statements which you made with respect to the face of the sheet 24-A would apply to the other sheets in the exhibit. I would like to find out if you are prepared to answer that question at this time?

A. I have not had an opportunity to yet check through the rest of the sheets under Exhibit 24.

Q. Will you do so at your first opportunity, Mr. Messenger? A. Yes, sir. [425]

Mr. Erskine: I hope it will be before I leave Chicago, although I am not prepared to state at this moment the date upon which I will leave.

Q. (By Mr. Erskine): I believe you have answered this before, but I want to make sure, for the sake of the record: The group of Exhibits marked with the figures 24 relates to the drafts discounted by the Merchandise National Bank for the United Produce Company during the year 1948, does it not?

A. It covers the entire year 1948, and several days also in 1947.

Q. With reference to the drafts discounted by your bank for United Produce Company?

A. That is correct.

Q. I will ask you, Mr. Messenger: Those were all drafts which were drawn by the United Produce Company upon drawees, or they purported to be drafts drawn by the United Produce Company upon drawees, and none of such drafts were

(Deposition of Frederick C. Messenger.)

accepted by the drawees thereof before the bank discounted them? A. That is correct. [426]

* * *

Mr. Lasky: All overdrafts in the bank?

Mr. Erskine: The records, the overdraft record, so far as it relates to United Produce Company.

Q. (By Mr. Erskine) Will you do that?

A. We do not have a specific record that relates to United Produce Company. That would be included in a regular report of overdrafts of any kind on any one day.

Mr. Lasky: Without segregation as to individual accounts?

The Witness: Without segregation as to individual accounts.

Q. (By Mr. Erskine): You have a daily report of overdrafts, do you?

A. Yes, we do have.

Mr. Erskine: I would like to see those daily reports of overdrafts, let us say, for the months of October and September, as they relate to the United Produce Company. In other words, I don't want to see those reports as they relate to other customers of the bank, but I would like to see the reports as they relate to the United Produce Company.

Mr. Lasky: Hasn't the witness just said they have no [460] such reports? They have a daily figure of such overdrafts which does not show how it is composed and refers to no names of customers, but is an aggregate.

(Deposition of Frederick C. Messenger.)

The Witness: It is a listing of overdrafts, but we come back to our noon-day overdraft figure, we have the same figure in the noon overdrafts, the same figure appears there which is on Defendant's Exhibit 20. (Indicating.)

Q. (By Mr. Erskine): With respect to those daily reports of overdrafts, those daily reports of overdrafts are submitted, are they not, during the closing hours of each day to the officers of the bank so that the officer in charge of any account appearing thereon can either approve the overdraft and direct its payment, or disapprove it and require the return of the checks creating the overdraft?

A. That is not true. The overdrafts are created after the posting of the books are completed, and there is no determination of returning items, or anything else, made at the time of the presentation of that report. That report is received some hours after the postings are completed.

Q. Who passes upon the question whether or not a check which might create an overdraft shall be paid or rejected? [461]

A. The officer handling that account is submitted that information.

Q. Is what?

A. Is submitted that information.

Q. In other words, when the bookkeeper keeping the records of any account reaches a point where a check creates an overdraft, a charge or check creates an overdraft, the bookkeeper brings the check to the officer of the bank in charge of

(Deposition of Frederick C. Messenger.)
that particular account to find out whether the check is to be paid, is that right?

A. Brings the ledger sheet and the checks.

Q. And the checks. Does the daily report of overdrafts indicate not only the amount of the overdraft, but also the checks creating the overdraft? A. No, it does not.

Mr. Erskine: I would like to see, at least, an illustration of such daily reports so far as they relate to United Produce Company, and I would like to have the witness produce such a report so I can take a look at it.

Mr. Lasky: Do you have some comment to make about that?

The Witness: Let us take a look at one of those reports.

Mr. Lasky: Let us do so. [462]

Mr. Lasky: Mr. Erskine, you asked for a sample of one of the overdrafts reports.

Mr. Erskine: Yes.

Mr. Lasky: I have in my hand one dated February 2nd, 1948, and when it comes down to the overdrafts, there is the heading "Overdrafts," and the date, and "Apprv. by—"

Mr. Erskine: What was that?

Mr. Lasky: I assume that that means "Approved By." Then there is another heading "Overdrafts Covered by Deposits."

The name of the United Produce Company does not appear under "Overdrafts," but it does appear

(Deposition of Frederick C. Messenger.)
in "Overdrafts covered by deposits," and I will
read what it shows there:

"United Produce Co.—2/2"—that is the
date, February 2; and then under the heading
"Approved by" appears the following:

"H.R. - Dis & Coll," which I would assume
are the initials of Mr. Reichwein, the "H.R."

The Witness: Mr. Reichwein's initials.

Mr. Lasky: And "Discount and Collection—
\$30,948.92."

Now, with that information, Mr. Erskine, I guess
you can ask the witness what it all means.

Q. (By Mr. Erskine): Would [463] you tell
me, Mr. Messenger?

A. Yes, sir. That overdraft list carries the total
of overdrafts as of our noon-day posting.

The overdrafts are divided into two groups; the
first group represents overdrafts that were not
covered by any deposits at the close of business
that day, and they would be true overdrafts.

This with the caption "Overdrafts Covered by
Deposits," in which this United Produce Company
item of approximately \$30,000 appears, was a noon-
day overdraft, which we had received in this par-
ticular case, approved by Mr. Reichwein to pay on
the basis that there was a credit coming from the
Discount Department on new loans; and a credit
coming from the Collection Department, on account
of drafts discounted.

Mr. Erskine: I take it, in view of the fact that

(Deposition of Frederick C. Messenger.)
people other than the United Produce Company
are mentioned on that record which you read, you
would prefer that I should not see that record.

Am I correct?

Mr. Lasky: Well, yes, I think that is our position.

Mr. Erskine: All right.

Mr. Lasky: Now, if you wish us to have a typist
take this, and just show the captions— [464]

Mr. Erskine: No. I think you read it into the
record, but I am curious to see the form. Do you
have a blank form I could see?

The Witness: That is strictly a typewritten record.
It is typed on a stencil, and we run the record
off that stencil.

Mr. Erskine: You run off copies.

The Witness: Yes.

Mr. Erskine: Well—

The Witness: We could take that document, and
run off the captions, we could just have the cap-
tions—

Mr. Lasky: Typed up?

The Witness: —run off, and under the “Over-
drafts Covered by Deposits” list that United Pro-
duce Company entry.

Mr. Erskine: All right. Would you do that
for me?

Mr. Lasky: Why not take that out and have
the girl start on it right now?

The Witness: All right. [465]

(Deposition of Frederick C. Messenger.)

Mr. Erskine: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not taken down by the Reporter.)

Mr. Lasky: Now, on the record, Mr. Erskine, let me give you at this time a copy of the Overdraft Report, with the headings, but otherwise blank, except for the item relating to United Produce Company.

Mr. Erskine: Thank you. I will ask the Reporter to mark this paper as Defendant's Exhibit No. 64 for identification.

(The paper referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 64 for identification.)

Mr. Erskine: Now, Mr. Lasky, I would like to discuss with my associates at this point, the advisability of starting with Mr. LeRoy at the present time, at this late hour.

(A short intermission followed.)

Mr. Erskine: I would prefer to suspend at this point, and begin with another witness tomorrow morning. [475]

* * *

Mr. Erskine: Now, Mr. Messenger, I think that I asked you to determine whether or not there were any written rules of the bank with respect to kites.

(Deposition of Frederick C. Messenger.)

The Witness: Yes.

Mr. Erskine: Written rules and regulations, that is.

The Witness: You did.

Mr. Erskine: Are there any such?

The Witness: No, sir, there are no such Operating Instructions.

Mr. Lasky: With respect to what?

The Witness: Kites.

Mr. Erskine: Now I believe that we were going to try to amend the stipulation with respect to the noonday balances, to take into consideration what was done as of the last day of each month.

Has that been done; has that been checked?

Mr. Lasky: Off the record.

(There occurred at this point an informal Discussion, outside the record, which was not recorded by the Reporter.)

Mr. Erskine: If it is agreeable to you gentlemen, I would like to suggest that we suspend at this time, and [497] come back a little earlier; say, at one o'clock this afternoon.

Mr. Lasky: Very well. [498]

* * *

Cross-Examination

By Mr. Lasky:

Q. All right. Hereafter we shall refer to it as Etribou. At the time you phoned to Mr. Etribou, did you have that tape with you?

(Deposition of Frederick C. Messenger.)

A. I did have.

Q. I believe you have testified that in your conversation with Mr. Etribou he called off to you the items of Lofendo checks which had cleared through the Lofendo account, is that correct?

A. I had first suggested that I call off the amounts that I had on my tape, and he suggested that he call off to me the items which they had paid during the month, and I could check them against my record.

Q. And was that done?

A. It was done.

Q. And as he called off the items which he said had been paid through the Lofendo account at East Bakersfield, did you note them?

A. I checked them off along the list.

Q. When you got through checking off all the items he called to you, did you have some items left on your tape which were not checked off?

A. Yes, I did.

Q. How much did they total? [530]

A. Approximately \$600,000.

Q. Did those checks which you still had left on your list come back to the Merchandise Bank thereafter? A. Yes, they did.

Q. Now, I show you here a group of checks marked Defendant's Exhibit 11—well, they were the checks in the Exhibit 11 group marked on your deposition, 11-A, C, E, G, I, K, L, M, N, O, P, Q, R, S, U, W, X, Y, and Z. I show you this group of checks. You have seen these before, have you?

(Deposition of Frederick C. Messenger.)

A. Yes, I have.

Q. Now, had you seen any of those checks on November 17th? A. No, sir, I didn't.

Q. Had any of those checks been in the bank, this bank, the Merchandise Bank, on November 17th? A. No, sir, they had not been.

Mr. Erskine: Pardon me a second. Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Q. (By Mr. Lasky): Do you want to refer to these checks again, Mr. Messenger? [531]

A. Yes. I believe I should change my last answer. I would like to refer to a copy of the wire that was sent to Mr. Dunlap for the amounts—

Q. Well, I show you here the wire, Defendant's Exhibit No. 3 on your deposition.

A. On the group of checks you submitted to me, checks that are marked Defendant's Exhibits 11-A, 11-C and 11-Z—

Mr. Erskine: On whose deposition?

Mr. Lasky: Messenger's.

A. (Continuing): —on my own deposition—those three checks totalling \$57,000-odd were received by us on November 17th and were in our possession on that date.

Q. (By Mr. Lasky): They were received by you at that time as rejected items, and were returned to you by the United Produce Company?

(Deposition of Frederick C. Messenger.)

A. And were returned to us by the United Produce Company.

Q. Returned to you by who?

A. By the Bank of America.

Q. Now, showing you the other checks in the group, all these I called off a moment ago, but excluding these three, can you say whether or not those checks were the items on that tape which you had not checked off after [532] your conversation, or as a result of your conversation with Mr. Etribou? A. Yes, they were.

Q. What do they total?

A. Somewhere approximating \$550,000.

Q. Were those checks part of the claim filed by the Merchandise National Bank in the bankruptcy of the United Produce Company?

A. Yes, they were.

Q. Now, by what date, if you can tell me from reference to the records, were all those checks returned to this bank from the East Bakersfield Branch unpaid? A. (No answer.)

Q. If you wish, you can consult any record here that will help you, if you can tell us what it is. How about the ledger account of the United Produce Company?

A. Yes. That might help. November 26th, 1948.

Q. Did they all come in on that date, or was that the date by which they had all come in?

A. That was the date on which all of them had been received.

Q. After they were received in this bank, Mer-

(Deposition of Frederick C. Messenger.)
chandise Bank, what was done with respect to them?

A. They were charged back against the United Produce [533] Company commercial account, and the checks themselves retained in the possession of the bank.

Q. If they had been charged off before November 15th, 1948, would there have been or would there not have been any apparent credit balance as of that date in the Commercial Account of United Produce Company, which I believe is Exhibit 2?

Mr. Erskine: Just a minute. I object to that question as hypothetical and calling for his conclusion. I think the form of it therefore is improper.

Q. (By Mr. Lasky): Will you answer the question, please, Mr. Messenger?

A. If all of the checks had been returned by November 15th, 1948, there would have been a very large overdraft appearing on the commercial account of the United Produce Company.

Mr. Erskine: Those are the checks in the group of exhibits marked No. 11 on the taking of your deposition?

The Witness: Yes.

Mr. Lasky: Yes.

Q. (By Mr. Lasky): If they had been charged off on or before the 15th, would there have been any apparent credit balance against [534] which to charge the six checks we have talked about approximating \$113,000-odd?

(Deposition of Frederick C. Messenger.)

A. There would not have been any balance whatsoever available for the payment of those items.

Q. May I see those checks, please?

A. Yes.

Q. If no credit had been passed on the basis of these checks we just referred to in the Exhibit 11 group, would there have been any credit balance in the commercial ledger account of the United Produce Company on November 15th?

Mr. Erskine: Now, of course, I have the same objection to this line of questions. It is hypothetical. The form does not strike me as being correct, and certainly they are incompetent, irrelevant, and immaterial, in addition.

Q. (By Mr. Lasky): Answer the question, please.

A. May I have the question repeated?

Mr. Lasky: Yes. Will you read him the question, please, Mr. Reporter.

(The question of counsel was thereupon read as above recorded.)

A. There would have been no balance in the account. [535]

* * *

Q. (By Mr. Lasky): Would there have been any apparent balance against which to charge the six checks aggregating \$113,000, about which we have been talking?

A. No; there would not have been any balance.

(Deposition of Frederick C. Messenger.)

Q. Do you have, or can you produce, the debit tickets for the charge-off of these checks in that Exhibit 11 group that we have been referring to?

A. Yes. I do have—we do have copies of those charges.

Q. Do you have them here?

A. Just a minute.

Mr. Lasky: This is on the record. These same checks have been reproduced photostatically in the bankruptcy claim, and I would like a stipulation that the photostatic copies as they appear in the bankruptcy claim may, for all purposes of this case, be used in lieu of the original checks if that becomes necessary.

Mr. Erskine: That is, the checks in the Exhibit 11 group?

Mr. Lasky: Yes.

Mr. Erskine: In the Messenger Deposition?

Mr. Lasky: Yes.

Mr. Erskine: I will stipulate, subject to correction. I do not know that they are all [536] included.

Mr. Lasky: Well, all these stipulations are, of course, subject to the right of any party to request, at the trial, all originals.

Mr. Erskine: And according to your understanding all of the checks in that group 11 are included as Exhibits on the bankruptcy claim?

Mr. Lasky: Yes.

Mr. Erskine: All right. I will stipulate that those exhibits to the bankruptcy claim may be used

(Deposition of Frederick C. Messenger.)
in lieu of the originals, subject to the reservation
you just mentioned.

Mr. Lasky: The only reason I bring that up is
that there may be other litigation in Chicago for
which we may have occasion to need the originals.

Mr. Erskine: That is all right. Haven't they
been photostated?

Mr. Lasky: I believe they have been microfilmed,
have they not?

Mr. Erskine: Yes.

Mr. Lasky: All right. We have it that way, too.

The Witness: I do not find all of those tickets
here.

Mr. Lasky: Make a note of that so we will have
them available tomorrow. [537]

* * *

By Mr. Lasky:

Q. Mr. Messenger, will you please take Defendant's Exhibits Nos. 21-A to 21-E, both inclusive, for identification, and point out the items thereon wherein the checks which came back from the Bank of America, which we referred to in our testimony of yesterday, and which are a part of the Defendant's Exhibit No. 11 for identification group, were charged off? A. I think, if I had—

Q. Do you want the Exhibit 11 group?

A. Yes, sir; then I would be definitely correct
in my answer.

Mr. Lasky: All right. We will get those.

(Deposition of Frederick C. Messenger.)

(The documents referred to were handed to the witness.)

A. On Defendant's Exhibit 21-C for identification, under date of November 17th, 1948, two items were charged off; one being in the amount of \$31,912.12, and the other, in the amount of [541] \$17,290.85.

On Defendant's Exhibit 21-D, for identification, under date of November 22nd—

Q. Now, hold on just a moment. A. Yes.

Q. Well, never mind; go ahead; but as you go through there, Mr. Messenger, can you point out what sheets of Defendant's Exhibit 11—that group—your charge-off relates to?

Mr. Erskine: Could we cover this by stipulation, and save time?

Mr. Lasky: He has the documents in front of him now, and I think he can give it to us faster than we could work out a stipulation.

Mr. Erskine: All right.

A. (Continuing): Under date of November 17th, Defendant's Exhibit No. 11-C for identification—

Mr. Lasky: Incidentally, these are all Messenger Exhibits.

A. (Continuing): —in the amount of—

Mr. Erskine: In the amount of what?

A. There was—I mean, was charged, in the amount of \$31,912.12. Protest fees were added to the original amount of the check.

(Deposition of Frederick C. Messenger.)

Defendant's Exhibit 11-A for identification [542] was likewise charged on that date, in the amount of \$17,290.85.

Under date of November 22nd, Defendant's Exhibit 11-O for identification was charged, in the amount of \$4,407.85.

Defendant's Exhibit 11-M for identification was charged in the amount of \$31,755.56.

Q. (By Mr. Lasky): When you say they were "charged," are you referring to a charge-off, or a charge-back? A. They were charged back.

Mr. Erskine: By a D. M.?

The Witness: By a Debit Memorandum, yes.

Mr. Erskine: All of them were charged back by a debit memorandum.

The Witness: Yes.

Mr. Erskine: All right.

A. (Continuing): Defendant's Exhibit 11-Q was charged in the amount of \$31,258.66.

Defendant's Exhibit 11-R for identification was charged in the amount of \$38,682.27.

Defendant's Exhibit 11-K for identification was charged in the amount of \$28,385.05.

Defendant's Exhibit 11-L for identification was charged [543] in the amount of \$25,819.49.

Defendant's Exhibit 11-N for identification was charged in the amount of \$38,044.91.

Defendant's Exhibit 11-W for identification was charged in the amount of \$25,316.35.

Defendant's Exhibit 11-V for identification was charged in the amount of \$35,807.43.

(Deposition of Frederick C. Messenger.)

Defendant's Exhibit 11-X for identification was charged in the amount of \$29,652.91.

Defendant's Exhibit 11-I for identification was charged in the amount of \$38,745.03.

Q. (By Mr. Lasky): Including in that, a protest fee of \$4.00? A. Yes, sir.

Q. Yes.

A. Defendant's Exhibit 11-E for identification was charged off in the amount of \$34,993.74, which included a protest charge of \$4.00.

Defendant's Exhibit 11-P for identification was charged off in the amount of \$39,333.51.

Defendant's Exhibit 11-S for identification was charged on November 26th, in the amount of \$27,-846.65.

Q. Including a protest fee of \$4.00?

A. Including a protest fee of \$4.00, yes, [544] sir.

Q. And that charge-off occurs on Defendant's Exhibit 21-E for identification? A. Yes.

Mr. Lasky: If you do not mind my leading the witness.

Mr. Erskine: Not a bit; go just as far as you want.

A. (Continuing): Under the same date, Defendant's Exhibit 11-U for identification was charged, in the amount of \$28,329.50, which included a \$4.00 protest fee.

Q. (By Mr. Lasky): Also on Defendant's Exhibit 21-E for identification? A. Yes, sir.

Q. Yes?

(Deposition of Frederick C. Messenger.)

A. On Defendant's Exhibit 21-C for identification, Defendant's Exhibit 11-Z for identification was charged, in the amount of \$8,504, including a \$4.00 protest fee.

Q. Under date of November 17th?

A. Under date of November 17th, 1948. On Defendant's Exhibit 21-D for identification, Defendant's Exhibit 11-G was charged, in the amount of \$36,527.52, which included \$4.00 of protest fees, and \$1.25 in wire charges.

Q. Now, were those charge-backs made on each item, as the checks were returned by the Bank of America, and arrived here at the Merchandise National Bank? [545] A. Yes, they were.

Q. Did the Merchandise National Bank receive from the East Bakersfield Branch of the Bank of America, or from the head office, wires concerning the rejection of those items prior to the receipt of the returned checks here in Chicago?

A. There were several wires received, regarding the rejection of those checks.

Q. Will you produce those wires, please.

A. Yes, sir.

(Certain documents were produced by the witness.)

Mr. Lasky: Here are a number of wires which have been produced by the witness. Mr. Reporter, will you please mark them as Plaintiff's Exhibits 1-A, 1-B and 1-C respectively for identification, on Mr. Messenger's Deposition.

(Deposition of Frederick C. Messenger.)

(The documents referred to were thereupon marked by the Reporter as Plaintiff's Exhibits Nos. 1-A, 1-B, and 1-C, both inclusive, for identification.)

Mr. Lasky: Now again, Mr. Erskine, with your permission, I will lead the witness on these documents, and documents of this character. [546]

Mr. Erskine: Yes, surely; go right ahead.

Q. (By Mr. Lasky): Plaintiff's Exhibits 1-A, 1-B and 1-C for identification, just marked by the Reporter, are the wires received by this bank from the Bank of America, to which you have just referred, are they not, Mr. Messenger?

A. Yes, sir.

Q. They are the original wires?

A. Yes, sir.

Q. Plaintiff's Exhibit 1-A for identification was received here on November 18th, was it?

A. Yes, sir.

Q. In handwriting, underneath the text of the wire, which is in code, appears a translation of it?

A. Yes, sir.

Q. Is that the decodification of that wire?

A. Yes, sir.

Q. Plaintiff's Exhibit 1-B for identification is another original wire received at the bank here from the Bank of America? A. Yes, sir.

Q. And that was received here on November 19, 1948? A. Yes, sir.

Q. Plaintiff's Exhibit 1-C is another original

(Deposition of Frederick C. Messenger.)

wire [547] received by this bank from the Bank of America; is that correct? A. Yes, sir.

Q. Received here in Chicago by the Merchandise National Bank on November 20th, 1948?

A. I can answer that this was received here. I am not definitely certain, however, whether we received it on that day, or the next business day.

Mr. Lasky: I see.

Mr. Erskine: May I see those wires, please, Mr. Lasky?

Mr. Lasky: In just a moment, if I may.

Q. (By Mr. Lasky): Underneath the typewritten text of Plaintiff's Exhibit 1-C for identification, there appears in pencil handwriting a corrected decodification of that wire; is that correct?

A. On Plaintiff's Exhibit 1-C for identification, there is a difference in the amount, from which it would appear that that one was not properly decoded at the time it was received.

Otherwise, the decoding would be correct.

Mr. Lasky: Now, you want to see these, do you?

Mr. Erskine: Yes.

Mr. Lasky: While counsel is looking at those wires, [548] Mr. Reporter, here is a group of documents which I will ask you to mark as Plaintiff's Exhibits 2-A, 2-B, and so on, for identification.

(The documents were thereupon marked by the Reporter as Plaintiff's Exhibits Nos. 2-A, to 2-S, both inclusive, for identification.)

(Deposition of Frederick C. Messenger.)

Mr. Lasky: With your permission, Mr. Erskine, I will also lead the witness on these documents.

Mr. Erskine: Certainly.

Q. (By Mr. Lasky): I show you here, Mr. Messenger, a group of papers which have just been marked by the Reporter as Plaintiff's Exhibits 2-A to 2-S, both inclusive, for identification.

Are these the debit memos which were made up in the Merchandise National Bank, and on the basis of which the charge-backs to which you have just referred in your testimony, in Defendant's Exhibit 21, the 21 group, were made?

A. Yes, sir, they are. [549]

* * *

A. I used the remittance sheets, as you referred to, Defendant's Exhibit 39-A, and sheets appearing in the same form—

Q. And heretofore marked for identification?

A. And heretofore marked for identification—and I used the photostatic copy of the account of Frank C. Lofendo with the East Bakersfield Branch of the Bank of America.

Q. Hold on a minute. Let's get that. Has that been marked in here? It has not, has it?

Mr. Tobey: No.

Mr. Laskey: All right. Let's get that.

Mr. Erskine: Will you read the question to me, please Mr. Reporter?

(The question was read by the Reporter as above recorded.)

(Deposition of Frederick C. Messenger.)

Mr. Lasky: By "discount" department, I mean the Loan Department.

Q. (By Mr. Lasky): It is all one and the same, is it not? A. Yes.

Q. You just referred to a document, the photostat of the ledger account of Frank C. Lofendo at the East Bakersfield [585] Branch of the Bank of America? A. Yes.

Q. Is that this series of sheets marked Exhibit No. 2 for identification on the Etribou Deposition?

A. Yes, sir.

Mr. Lasky: I will ask that these photostatic copies be marked as Plaintiff's Exhibit 4 on this Deposition.

(The documents referred to were thereupon marked by the Reporter as Plaintiff's Exhibits Nos. 4-A to 4-H, both inclusive, for identification.)

Mr. Lasky: I do not see any point in re-photostating those.

Mr. Erskine: No.

Mr. Lasky: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not taken down by the Reporter.)

Q. (By Mr. Lasky): We interrupted you, Mr. Witness. What other documents, if any, did you use besides these two?

A. The document that has been generally referred to as the Gassman memorandum.

(Deposition of Frederick C. Messenger.)

Mr. Erskine: I did not understand that. [586]

Q. (By Mr. Lasky): By "Gassman Memorandum," do you refer to the document marked on the taking of Mr. Gassman's Deposition as Plaintiff's Exhibits Nos. 16-A to 16-X? A. I do.

Q. And did you refer to any other documents?

A. I also referred to the Deposit Tickets which have been introduced as Exhibits—

Q. You mean marked as Exhibits?

A. Marked as Exhibits—

Q. You mean the documents marked as Defendant's Exhibit 36 group, 37 group, 35 group, 33 group and 34 group? A. That is correct.

Q. Did you find that there were any checks drawn on the Lofendo Account at the East Bakersfield Branch which came into the Merchandise Bank, into the Loan Department, other than such as are listed expressly by name and amount on the so-called daily remittance sheets?

A. No, sir; I did not find any other items.

Q. Were there any others? A. No, sir.

Q. Mr. Messenger, as the so-called daily remittance [587] checks came in from United Produce Company to this bank, Merchandise National Bank, were they the basis of new loans?

A. No, sir; they were not the basis of new loans. They created, by their acceptance and use as a payment—a purported payment on the loans of United Produce Company—they created an area in which additional loans could be granted, and new loans granted were granted on the basis of new collateral.

(Deposition of Frederick C. Messenger.)

Q. You have referred to an area of credit within some limits. Within what limits?

A. The area of credit is the amount in which the loan was less than the \$200,000 limit established for that line.

Q. Established by whom?

A. By the Discount Committee of the Board of Directors.

Q. I believe that on your direct examination you were asked what float is. What is float?

A. Float represents checks accepted, and which are not considered—let me start that answer over again.

Float represents the amount involved in a check or checks until their ultimate payment. The bank has no use of those funds until payment is actually made.

* * *

[Endorsed]: Filed June 7, 1950. [588]

DEPOSITION OF WILLIAM F. COLLINS

* * *

Mr. Moses: I would like to have the record show that this deposition is being taken upon notice, duly served upon the attorneys of record in the proceeding in the District Court of the United States for the Northern District of California, Southern Division.

I would also like to have the Reporter attach the notice to the deposition.

(Deposition of William F. Collins.)

(Said notice was thereupon filed with the Notary Public, and the same is attached hereto and returned herewith.)

Mr. Moses: Will you swear the witness, please,
Mr. Reporter?

Thereupon:

WILLIAM F. COLLINS

called as a witness by the Defendant in the above-entitled cause, having been first duly sworn, was examined upon oral interrogatories and deposed and said as follows:

Direct Examination

By Mr. Moses:

Q. Mr. Collins, I will ask you to state your full name to the Reporter. A. William F. Collins.

Q. What business are you engaged in?

A. Banking.

Q. What bank, please?

A. Lincoln National Bank, Chicago.

Q. What position do you hold?

A. At the present time, I am President.

Q. Where is your bank located?

A. Irving Park Road and Lincoln Avenue.

Q. Now, Mr. Collins, you were subpoenaed to appear for the taking of this deposition, were you not? A. I was.

Q. Who served you? A. You did.

Q. When? A. On the 24th of May.

Q. At ten o'clock in the morning?

(Deposition of William F. Collins.)

A. At approximately ten o'clock in the morning, yes, sir.

Mr. Moses: I would like at this time to file with the Notary, the original subpoena, a copy of which was served upon Mr. Collins, and have it attached to the deposition.

(Said subpoena was thereupon filed with the Notary [4*] Public, and the same is attached hereto and returned herewith.)

Q. (By Mr. Moses): Mr. Collins, were you at any time in the employ of the Merchandise National Bank of Chicago? A. I was.

Q. During what period of time?

A. From about the first of December, 1934, until the 31st of October, 1948.

Q. And what was your position when you left the bank in October of 1948?

A. I was Cashier.

Q. As Cashier of the Bank, what were your duties?

A. I was the Operating Officer of the bank.

Q. Did you have anything to do with the extension of loans to customers of the bank?

A. No, I did not.

Q. Did you have anything to do with any credit?

A. No.

Q. As a matter of fact, your duties included mostly personnel work in the bank; is that correct?

A. Yes, sir—that, and the internal operation of the bank. [5]

(Deposition of William F. Collins.)

Q. Mr. Collins, during the second half of 1948, was your attention called to the account of the United Produce Company? A. Yes, sir.

Mr. Moses: Mr. Reporter, will you please mark this document as Defendant's Exhibit No. 1, Collins, for identification.

(Said document was thereupon marked by the Notary Public, as Defendant's Exhibit to this Deposition No. 1 Collins, for identification; and a photostatic copy of the same is attached hereto and returned herewith.)

Q. (By Mr. Moses): Mr. Collins, I show you here what has been marked by the Reporter as Defendant's Exhibit No. 1, Witness Collins, for identification, and will ask you if you recall having seen this check before?

A. Yes, sir, I am quite certain that I did.

Q. And when was that, do you recall?

A. It was in the latter part of September, 1948.

Q. And what were the circumstances under which you saw that check? [6]

A. As I remember it now, I received a report from one of the tellers in the bank, who handled returned checks, that a fairly large item had been returned unpaid, against the account of the United Produce Company, which was the endorser.

We had a system in the bank whereby, on notice, or upon actual return, whichever came first, of larger items, the facts of the case were reported to me, so that we could govern the handling of the re-

(Deposition of William F. Collins.)

turned checks accordingly, and know as soon as possible what we might be dealing with.

Q. Can you fix the date when the check was shown to you? Can you tell, by examining the check?

A. Probably within a day or two of time, but I would hesitate to attempt to fix that actual date.

However, I would say that it was somewhere around, or approaching, the 22nd or 23rd of the month.

Q. Of September? A. Yes, sir.

Q. 1948?

A. Yes, sir. It may have been later. Some of these dates are pretty hard to read.

Q. Well, it was the latter part of September, at least. [7]

A. It was the latter part of September, yes, sir.

Q. Now, when you had that check called to your attention. what did you do?

A. As I recall it now, I first inquired of the Return Teller whether or not he had placed a "Hold" against the account of the United Produce Company, to provide for charging the account back with the item; and also as to whether it had been shown to any of the other officers of the bank who may have been handling the credits of the United Produce Company.

I cannot state the exact answer that I received, but I am quite sure that I did determine to my own satisfaction that funds were on our books to

(Deposition of William F. Collins.)

allow the charge-back of the check, so that it could be retired.

Q. Did you talk to any other officers of the bank about this check that had been returned unpaid? A. Yes, I did follow it up.

Q. Who did you talk to?

A. I talked to Mr. LeRoy.

Q. Was Mr. Reichwein there at that time?

A. No, sir. If I remember correctly, he was on his [8] vacation at that time.

Q. Mr. Reichwein was the officer in charge of this account of the United Produce Company; is that correct?

A. More or less, yes; the account was assigned to him although in his absence, of course, the account would be temporarily serviced by one of the other men.

Q. Which other man would that be?

A. I am pretty sure that Mr. LeRoy was handling it temporarily, in Mr. Reichwein's absence.

Q. Then what did you do? Did you call for a statement of the account, and examine it, before you talked to Mr. LeRoy about it?

A. No, sir, I do not recall that I did exactly that. I showed it to Mr. LeRoy.

Q. You showed the check to Mr. LeRoy?

A. I showed the check to Mr. LeRoy, yes, sir.

Q. Yes?

A. (Continuing): And raised a question as to the size of a returned item like that, and suggested that we might look into the account, just to determine its status.

(Deposition of William F. Collins.)

Q. And what did Mr. LeRoy say?

A. He agreed with me; and after some little time, [9] although I would hesitate to say how many days, the Credit Department, not having had the time to delve into the account, and trace the deposits, and the flow of checks, and so forth, Mr. LeRoy finally asked me if I would make a rather cursory examination of the figures in the account, which I did.

Q. And what did you find, when you made that examination?

A. I found that, in my opinion, they were drawing very heavily against uncollected funds, at least, and that, added to the interchange of checks between the United Produce Company and others, possibly the thing went beyond that, although at that time that was just a possibility.

Q. Did the account disclose the fact that they had been drawing heavily against uncollected funds? A. Yes, it did.

Q. And that was not merely a matter of your opinion, was it? A. No, sir.

Q. That was a matter of account, a matter of record?

A. That much of it was factual, yes, sir.

Q. That was factual? A. Yes, sir. [10]

Q. Now, did you notice, in your examination of this account, any similarity between the debit and credit sides, as to amounts?

A. Yes, sir, I did—at least, it impressed me that way.

(Deposition of William F. Collins.)

Q. And what opinion, if any, did you form as to the effect of that?

A. I felt that there was a fair possibility that they were kiting checks.

Q. Well, after you made your examination of this account, did you then talk to Mr. LeRoy further about it? A. Yes, sir, I did.

Q. And what did you tell Mr. LeRoy?

A. I told Mr. LeRoy of my personal opinion; and I also showed him quite a number of transactions, both debits and credits, to support the feeling that I had.

Q. What feeling was that?

A. That there was a possibility of kiting, there was a good possibility of kiting; and also that, at the very least, they were drawing heavily against uncollected funds.

Q. What, if anything, did Mr. LeRoy say?

A. Mr. LeRoy responded, after going over the entries [11] with me, by—I cannot quote his exact language, but he told me that he fairly well agreed with me, and felt that we should take the matter up with Mr. Redheffer.

Q. Did you then take the matter up with Mr. Redheffer? A. Yes, sir, we did.

Q. Both of you? A. Both of us.

Q. Immediately? A. Immediately.

Q. And what conversation took place between Mr. Redheffer, Mr. LeRoy and yourself with respect to the account at that time?

A. Mr. LeRoy and I voiced our opinions, and

(Deposition of William F. Collins.)

told Mr. Redheffer those things that we had seen in the account, or felt that we had seen in the account; and Mr. LeRoy pretty well suggested to Mr. Redheffer that a more thorough examination be entered into, in regard to the United Produce Company's dealings with us.

Q. Did you tell Mr. Redheffer that, in your opinion, there was a possibility of check kiting in this account?

A. Yes, sir, that was firmly made.

Q. And did Mr. Redheffer then suggest that there be [12] an investigation of this account?

A. Yes; he concurred.

Q. And was such an investigation made?

A. I am quite sure that there was—as a matter of fact, I am positive that there was, yes, sir.

Q. Did you have anything further to do with the matter, beyond the conference there that you had with Mr. LeRoy and Mr. Redheffer? A. No.

Q. Subsequent to that?

A. No, I did not. The matter was taken over by the Credit Department, the Loaning Officers, and by Mr. Redheffer.

Q. And beyond the conference with Mr. Redheffer and Mr. LeRoy, you did not follow the matter up after that? A. No, sir.

Q. Do you know whether or not an investigation was made?

A. Yes, I am quite sure that an investigation was made by the Credit Department.

(Deposition of William F. Collins.)

Q. Do you know who the individual was, who made that investigation?

A. Yes; I remember that Mr. Tague was the accountant who went over and examined their books, and obtained [13] an explanation from them of the exchange of checks between themselves and others.

Q. Your recollection is, then, that all of the conversations that you have testified to, both with Mr. LeRoy and Mr. Redheffer, were in the latter part of September of 1948; is that right? A. Yes.

Q. And those conversations took place in the bank? A. In the bank.

Q. Did you talk to any other officer of the bank about this account?

A. Oh, I am quite sure that I did, Mr. Moses, yes. A thing like that was almost bound to be a matter of somewhat general discussion among the officers who would be working in any manner on the account, or servicing it in any manner.

I know that at the time that it was first drawn to Mr. Redheffer's attention by Mr. LeRoy and myself, he immediately called Mr. Rudolph in, and I think Mr. Royds, and there was a general discussion about their drawing against uncollected funds, and about the exchange of checks, and so forth, and so on.

That much of it was generally discussed [14] among at least those officers.

Q. Was there any discussion with respect to the

(Deposition of William F. Collins.)

similarity of amounts of debits and credits, when uncollected funds were drawn against?

A. I would hesitate to say that there was a pointed discussion with reference to that; but the exchange of checks, of course, was discussed, because that was one of the purposes of the further investigation which was being made by Mr. Tague.

Q. When you left the Merchandise National Bank, Mr. Collins, what place did you then go to?

A. I went first to the Upper Avenue National Bank, Chicago.

Q. What position did you hold there?

A. Cashier.

Q. What was your relationship with the Merchandise National Bank at the time you left, in regard to being a friendly or an unfriendly relationship?

A. Oh, it was perfectly friendly. I withdrew from the Merchandise National Bank voluntarily, for purely private reasons. [15]

* * *

Cross-Examination

By Mr. Riordan:

Q. Did your operations and your responsibilities at the Merchandise National Bank acquaint you with the practice of that bank in connection with the handling of items drawn against uncollected funds? A. Yes, sir.

Q. Given a situation such as you say your investigation at that time revealed in the account of

(Deposition of William F. Collins.)

the United Produce Company, where checks were drawn against uncollected funds, what was the procedure within the bank in that connection?

A. What was the procedure and policy of the bank at that time?

Q. Yes, at that time?

A. With this particular customer, or with all customers in general?

Q. With customers in general.

A. The practice was to deal with each customer on an individual basis. In some cases we would allow— [33] that is, we did allow, the bank did allow, customers to draw against uncollected funds, and in some cases, it forbade it.

Q. And whether that was allowed, or not, was a matter of the exercise of judgment?

A. Yes, sir.

Q. By whom?

A. By any one of several officers. It might have been Mr. Redheffer, the President; it might have been Mr. Cottle, a Vice-President; it might have been Mr. Reichwein, a Vice-President; it might have been Mr. LeRoy, a Vice-President; on some occasions, on the more normal or ordinary accounts, it might have been upon my judgment; and in other lesser cases, it might have been upon the judgment of one or another of the junior officers.

Q. In other words, it rested within the discretion of an officer— A. Yes.

Q. (Continuing): —as to whether checks

(Deposition of William F. Collins.)

drawn against uncollected funds would be honored, or otherwise? A. Yes.

Q. And is that standard practice at most banks, to [34] your knowledge?

A. In essence, yes. [35]

* * *

Q. Mr. Collins, do you have any view to express concerning a difference in the position of the bank with respect to uncollected items, as against the position of the bank in a straight extension of credit to a customer of the bank?

A. Yes; I think that you are dealing there with two entirely different things. Even though the result of your handling may have much the appearance of being identical, my personal opinion would be that you are [41] traveling two completely different roads.

Q. By "two completely different roads," you mean, do you, that, as a last resort, you have the benefit, that is, the bank has the benefit, of the credit capacity of the party drawing the check or checks which make up the uncollected items?

A. You place a portion of your reliance on the liquidation of the money that you have advanced, upon the payment of checks by the maker upon their presentation.

Q. Ability to pay, that is? A. Yes.

Q. The maker's ability to pay?

A. Yes, sir, and also the willingness to pay, of course.

(Deposition of William F. Collins.)

Q. So that your position, on the basis of the testimony which you have just given, is not that, in permitting withdrawals against uncollected items, the operation is identical with that of a loan to a depositor?

A. No, it is not identical. [42]

* * *

Q. Mr. Collins, what has been your experience, while at the Merchandise National Bank, concerning the occasions, [44] speaking in terms of relation to the aggregate, of the dishonored or uncollected items?

In other words, where withdrawals have been permitted against uncollected items, what has been the experience of the Merchandise National Bank, within your knowledge? Were there many, or few of such items dishonored?

A. Speaking of that bank only, there were relatively few dishonored.

* * *

Mr. Riordan: Now, back on the record.

Q. You understood, did you not, Mr. Collins, that my [45] question was directed to your experience with respect to depositors' transactions throughout the bank, as a whole? A. Yes.

Q. Its operations as a whole?

A. Among their entire list of depositors.

Q. Yes.

A. The entire number of times out of that number of transactions, where uncollected funds might

(Deposition of William F. Collins.)

be involved, the number of those occasions, as I say, was relatively few. [46]

* * *

Q. Yes, but my question was directed to the experience with accounts of customers exclusively who were making loans.

I just wanted to get from you an idea, based upon your experience, of how many of those checks were returned unpaid; and I do not mean, how many in number, but I mean, what percentage were returned unpaid in those cases wherein you allowed bank customers to draw against uncollected items.

A. I would say, for all practical purposes, that there were hardly any.

Q. In your investigation of the account of the United Produce Company covering a large part of the month of September of 1948, did you find instances where items that made up uncollected funds, were returned unpaid? I mean, instances other than this Defendant's Exhibit 1?

A. No. [48]

* * *

Q. You have testified also, Mr. Collins, that following your discussions with Mr. Redheffer and Mr. LeRoy, [56] an investigation was undertaken by the Credit Department, and you mentioned Mr. Tague. A. Yes, sir.

Q. What was Mr. Tague's capacity at the bank?

A. He was an accountant, employed to make outside examinations of borrowers' books and records.

(Deposition of William F. Collins.)

Q. Do you know of your own knowledge whether Mr. Tague made such an outside examination after your discussion with Mr. Redheffer and Mr. LeRoy?

A. Yes.

Q. And do you know the result,—or, first, was there one or more than one examination?

A. To my own personal knowledge I only know of the one that he made immediately following the raising of this entire question.

Q. And do you know the result of that examination?

A. I know it as it was discussed at the bank among the officers who had knowledge of the situation.

Q. What, so far as you learned, did that examination disclose?

A. It disclosed the fact that Mr. Tague found their books and their records, as far as entries were concerned, to be in order. [57]

It also disclosed that he had inquired of people of the United Produce Company as to what the checks were, that were deposited by them, and what the checks were for that they issued often to the same people whose checks they deposited.

Q. Yes?

A. (Continuing): And the explanation was that it involved the mechanics, on the one hand, of United Produce Company advancing funds at the start of a crop season, to orchardists and vineyard people, principally in California, to give them working capital to produce a crop, upon which crop the

(Deposition of William F. Collins.)

United Produce Company would then have first claim when it came to harvest; and when it did come to harvest, the United Produce Company bought that crop, and paid the growers for the crop, and the growers in turn drew checks payable to the United Produce Company, to repay the growers' loans.

As I say, that was the explanation which was given by the people at United Produce Company to Mr. Tague, and Mr. Tague brought that explanation back to the people at the Merchandise National Bank.

* * *

[Endorsed]: Filed June 5, 1950. [58]

[Title of District Court and Cause.]

DEPOSITION OF HENRY J. REICHWEIN

* * *

Mr. Erskine: Will you swear the witness please, Mr. Reporter?

Thereupon

HENRY J. REICHWEIN

called as a witness on behalf of the Defendant, having been first duly sworn, was examined upon oral interrogatories, and deposed and said as follows:

(Deposition of Henry J. Reichwein.)

Direct Examination

By Mr. Erskine:

Q. Please state your full name, Mr. Reichwein.

A. Henry J. Reichwein.

Q. Where do you reside?

A. 12036 Harvard Avenue, Chicago, Illinois.

Q. You are an officer of the Merchandise National Bank? A. Yes, sir.

Q. What office?

A. Vice-President and Cashier.

Q. How long have you occupied that position?

A. As Vice-President and Cashier, for, I believe, a year and a half. Previous to that time, for about five years, I was Vice-President, and for about five years prior to that time, I was Vice-President and Cashier.

Q. I see. In other words, there was an interval there during which—— [3*]

A. I was not Cashier.

Q. ——you were not Cashier.

A. That is right.

Q. About how long have you been in the banking business, Mr. Reichwein? A. Since 1907.

Q. You are of legal age, then—just for the benefit of the Reporter. A. Yes, sir.

Q. Would you tell us just in a general way, Mr. Reichwein, your duties as Vice-President and Cashier of the bank. A. Of this bank?

Q. Of this bank.

A. Yes, sir. My duties as Vice-President have

(Deposition of Henry J. Reichwein.)

been those of a loaning officer. The Cashier's duties, to a great extent, have been delegated to other people.

Q. Have been what?

A. Delegated to others, to other people.

Q. I see. Subject to your supervision?

A. That is right.

Q. The Cashier's duties generally include the operation of the bank, do they not? A. Yes.

Q. And the personnel of the bank? [4]

A. That is right.

Q. And the duties as a loaning officer include, I presume, the determination of whether or not credit is to be extended to a borrower, and the amount of such credit.

A. Yes, subject to the supervision, of course, of the Loan Committee.

I have authority up to a certain amount, but beyond that, the loans, before being made, must be approved by the Loan Committee, and the Discount Committee of the Directors.

Q. I see. And they approve actions which are contemplated by you, and recommended by you, do they? A. Yes, sir—and other loaning officers.

Q. Yes. A. That is right.

Q. And I suppose that the duties of a loan officer—or a loaning officer, include the determination of the character and kind of collateral which is to be taken to secure loans, if any collateral is to be taken? A. That is right.

Q. And do they also include the determination of

(Deposition of Henry J. Reichwein.)

whether or not credit is to be extended without any collateral?

A. Yes—we make recommendations, that is.

Q. The loaning officer does not make the final decision? [5] A. That is right.

Q. He makes recommendations to the Loan Committee; is that what you call it?

A. Yes—the Officers' Loan Committee.

Q. The Officers' Loan Committee?

A. Yes, sir.

Q. Does the Loan Committee make the decision, then, or does it have to go to the directors?

A. The Officers' Loan Committee, if it is a loan over \$10,000, recommends the loan to the Discount Committee, and the Discount Committee has final approval and say-so.

In other words, a loan cannot be made, if it is over \$10,000, unless the loan is recommended by the Officers' Loan Committee to the Discount Committee; and they give final approval.

Q. The Discount Committee is composed of whom?

A. Four or five members of the Board of Directors.

Q. I see. And that was the way in which the bank was functioning during the year 1948?

A. Yes, sir.

Q. I presume that the recommendation of the Loaning Officer to the Officers' Loan Committee, and the recommendations of the Officers' Loan Committee to the Discount Committee of the Board of

(Deposition of Henry J. Reichwein.)

Directors, included all of the [6] details, all of the pertinent details, with respect to any proposed loan which should be before any loaning officer, or Committee, in deciding whether or not a loan should be granted?

Mr. Lasky: Now, just a moment. Tucked away in that question is the word "pertinent" or the words "pertinent information."

Mr. Erskine: Yes. Well, I will withdraw the question. I think that the objection is probably good.

Q. But in any event, Mr. Reichwein, the loan officer does submit certain details to the Officers' Loan Committee, with respect to any loan which he recommends be made, bearing upon the nature of the loan, whether secured or unsecured, and upon the customer to whom the loan is proposed to be made.

A. That is right.

Q. And that information is then handed on by the Officers' Loan Committee to the Discount Committee?

A. That is right.

Q. I take it, Mr. Reichwein, that the Board of Directors of the Bank has given authority to the Discount Committee to make final decision with respect to proposed loans?

Mr. Lasky: If the witness knows of his own personal knowledge, he may answer that question. [7]

Mr. Erskine: I admit it calls for a conclusion, but I am just trying to shorten matters.

Mr. Lasky: Yes, it does.

(Deposition of Henry J. Reichwein.)

Mr. Erskine: If the witness knows.

A. I will answer that question in this fashion, that the Discount Committee of the Merchandise Bank is appointed by the Board of Directors.

Q. (By Mr. Erskine): And does the Board of Directors, upon appointing it, adopt a resolution providing that that Committee should have the power to pass upon proposed loans and reach the final decision with respect to proposed loans?

A. I believe that is in the By-Laws, yes.

Q. Yes. Now, Mr. Reichwein, were you in the year 1948, and in preceding years as a matter of fact, acquainted with the United Produce Company? A. Yes, sir.

Q. When did the United Produce Company establish an account with, and become a customer of, this bank?

A. I believe it was originally in 1943, and then I believe temporarily the account was closed, and again reopened in 1945.

Q. And then continued from 1945, down to and including, November of 1948? [8]

A. That is right.

Q. Now in 1948, the bank was loaning the United Produce Company—or rather, let me put it this way, Mr. Reichwein: You bankers have an expression that you call "a line of credit," have you not?

A. Yes, sir.

Q. Would you tell me what is meant when a banker refers to a line of credit to a customer of a bank? A. Well—

(Deposition of Henry J. Reichwein.)

Mr. Lasky: Just a moment. The witness may testify what he means, and what the usage in this bank is.

Mr. Erskine: Yes.

A. When a line of credit is established, it means that the customer has available to him, credit up to a certain amount, based on the security, if there is any security, in the approval; or if the approval is for an unsecured loan, without security.

Q. Yes?

A. And he may use all or part of that approval during the period for which the approval has been granted.

Mr. Lasky: In other words, there is a maximum beyond which the bank will not make loans to him.

The Witness: That is right. [9]

Q. (By Mr. Erskine): It is a maximum credit?

A. That is right.

Q. And it can be either secured or unsecured?

A. Yes.

Q. Depending upon the terms of the transaction with the customer. A. Yes, sir.

Q. That is right? A. That is right.

Q. In the case of the United Produce Company, what was the line of credit that was extended by this bank to that company during 1948, Mr. Reichwein?

Mr. Lasky: Just a moment, please. Well, go ahead. You have already seen the information, the formal matters.

Mr. Erskine: Yes.

(Deposition of Henry J. Reichwein.)

Mr. Lasky: Go ahead.

Mr. Erskine: This is just preliminary.

A. Well, I will tell you, I do not remember off-hand, but I believe that several times during the year 1948, the line was increased. However, I do know this, that during the year 1948, the line was \$200,000 on the assignment of all of their Accounts Receivable, plus some Government Bonds which we were holding as additional collateral. [10]

The Accounts Receivable loan at no time was to exceed \$200,000, regardless of the amount of accounts which were assigned to us.

Mr. Lasky: Do you mind if I interrupt?

Mr. Erskine: Go ahead.

Mr. Lasky: We might as well get some of these things accurate, so that there will not be any room for dispute, about them.

Mr. Erskine: That is right.

Mr. Lasky: The witness said that he was not sure, but he thought that several times during the year 1948, the line of credit was increased.

Is it not a fact, Mr. Reichwein, that there was only one increase in 1948, which brought it up to \$200,000, the line of credit, and that previous increases had occurred in prior years?

The Witness: Well now, I cannot be sure about that without looking at the records.

Mr. Lasky: Well, all right. As long as the records show it, your testimony on that is not given as a certainty.

The Witness: No.

(Deposition of Henry J. Reichwein.)

Mr. Lasky: All right. The records are available.

Mr. Erskine: I think it is already in the record, and these are just preliminary questions. [11]

Q. (By Mr. Erskine): At any rate, Mr. Reichwein, during part of the year 1948, the latter part of the year, the line of credit being extended to the United Produce Company by this bank, was \$200,000; is that correct?

A. Yes—on accounts receivable.

Q. Yes. A. That is right.

Q. And in addition to that, the bank discounted drafts from the United Produce Company?

A. Yes, sir.

Q. Now a loan of \$200,000, secured by assignments of Accounts Receivable, was the legal limit of the bank? A. Yes.

Mr. Lasky: Now, just a moment. I move to strike out the answer of the witness, and request the witness to withhold his answers until I have an opportunity to voice an objection, if I wish to do so.

That question calls for a conclusion of the witness, as to whether or not that is the legal limit, based on various facts.

Mr. Erskine: I will say, I think the objection is good, and I will withdraw the question, and I consent that the answer of the witness may be stricken out. [12]

I was not attempting to trap the witness in any way.

Q. (By Mr. Erskine): The point that I am endeavoring to come to, Mr. Reichwein, is this, that

(Deposition of Henry J. Reichwein.)

that was a large line of credit for the bank to extend, was it not—

Mr. Lasky: Just a moment. [13]

* * *

Q. (By Mr. Erskine): Yes. All right. Now, Mr. Reichwine, I would like to ask you this question also: In what business, according to your knowledge, was the United Produce Company engaged during the time from, according to your recollection, 1945, the year 1945, until the end of November of 1948?

A. The buying and selling of produce.

Q. Throughout the United States?

A. Yes, sir.

Q. And you know as a banker, do you not, Mr. Reichwein, that a concern that is engaged in the business of buying and selling produce, is engaged in a business in which there are great fluctuations in the prices of the commodities in which it is dealing?

Mr. Lasky: Well now, wait a moment. That is assuming [14] something that is not in evidence, namely, that there are great fluctuations.

Mr. Erskine: Well, I am asking him if that is a fact.

Mr. Lasky: You asked for his knowledge, whereas all that he can give you is his understanding.

Mr. Erskine: I just want to get his understanding, his state of mind, about this company.

Will you answer the question, please, Mr. Reichwein?

(Deposition of Henry J. Reichwein.)

The Witness: Would you repeat it, please?

Mr. Erskine: Read it, Mr. Reporter.

(The question was thereupon read by the Reporter as above recorded.)

A. I do not believe, and it is not my understanding, that during that period there were wide fluctuations in prices.

Q. (By Mr. Erskine): That is, of the commodities in which the United Produce Company was dealing? A. That is right.

Q. You did not regard that business during that period, then, as a speculative business?

A. No, sir, I did not, because the United Produce Company did not take a position in the market. They were [15] buying only what they had sales for, or what they had orders for.

Q. At least, that was what you were told by Mr. Rosenthal, of the United Produce Company, during that period?

A. That is what the records would indicate, because the statements did not show at any time, any large amount of inventory.

Q. By "the statements," you refer to statements of the United Produce Company?

A. Yes, sir.

Q. Which from time to time were submitted to the bank. A. That is right.

Q. Now, I think you have already mentioned, Mr. Reichwein, the fact that the bank, besides extending a line of credit to the United Produce Company, discounted drafts for them also.

(Deposition of Henry J. Reichwein.)

A. That is right.

Q. And it was doing that during the year 1948?

A. Yes, sir.

Q. You kept in touch with that side of the business, did you, constantly? A. Yes, sir.

Q. You were the loan officer in charge of the loan being made by the bank to the United Produce Company, were you [16] not? A. Yes, sir.

Q. And I take it that each loaning officer of the bank has a certain number of accounts to which he gives his special attention; is that correct?

A. Yes, sir.

Q. And the loan of the bank to the United Produce Company, was one of the loans to which you gave your special attention; is that correct?

A. Yes, sir.

Q. Now, were any of the drafts that were discounted by the bank for the United Produce Company, accompanied by bills of lading?

A. Very few.

Q. Is there any way of determining which of them were so accompanied?

A. I do not believe there would be at the present time, no, sir, because the documents have all been delivered, of course.

Mr. Lasky: That is, when a draft is paid—

The Witness: Yes.

Mr. Lasky: —the documents accompanying it go on to the man who has paid.

The Witness: Yes, sir. [17]

Q. (By Mr. Erskine): Can you remember any

(Deposition of Henry J. Reichwein.)

instance in which a draft was accompanied by a bill of lading?

A. No, sir, I cannot remember any specific instance of that, at this time.

Q. I call your attention to this bankruptcy claim which the Merchandise Bank filed in the Bankruptcy proceedings of the United Produce Company, and which shows in the statement of account \$117,819.31. Do you remember that item?

A. Yes.

Mr. Lasky: Unless the witness testifies that he had something to do with the preparation of that bankruptcy claim, or otherwise authenticates it, I don't see how you can use that document to refresh his memory about anything at all.

Mr. Erskine: I think I can because, as I understand it, Mr. Lasky, it is agreed, although I am not positive of this, that the photostats attached to the claim are photostats of the original papers that have been photostated, and that those original papers were in the custody of the bank.

Mr. Lasky: It is agreed and understood that the photostats attached to that bankruptcy claim may be used as [18] if they were the originals.

Mr. Erskine: That is right.

Mr. Lasky: So, if you wish to exhibit one of those photostats as if it were the original, and if he knows anything about it, that is all right.

Q. (By Mr. Erskine): Now, Mr. Reichwein, I have already called your attention to the fact that the bankruptcy claim refers to certain unpaid drafts, and I now call your attention to the fact that

(Deposition of Henry J. Reichwein.)

the bankruptcy claim has attached to it photostatic copies of unpaid drafts, together with invoices and delivery orders, there being altogether 56 such documents according to my count, which we will take subject to correction, and I would like to have you take a look at those documents, those drafts, I should say, attached to the bankruptcy claim, together with the accompanying documents, the delivery order and the form of the invoice, and I would like to have you tell me, Mr. Reichwein, whether or not it is the fact that the drafts discounted by the bank for the United Produce Company were in the form of the drafts attached to the bankruptcy claim, and which I have just shown you, and whether or not such drafts were accompanied by papers like delivery orders and invoices attached to the claim, [19] that is, during the year 1948.

A. The drafts which they presented for discount, in the majority of cases, were accompanied by an invoice and a delivery order.

Q. In the majority of cases. Wasn't that practically always true? A. Yes, I would say so.

Q. Now, we had some discussion yesterday with Mr. Messenger relating to this business of pre-posting and delayed posting, and he had me confused. Now, supposing we just start this thing over again. The items that appear upon a statement like the statement of the United Produce Company, Defendant's Exhibits 20 or 21 in this case, are what you bankers call "clearings," which consists solely of counter work, which consists of both debits and credits? A. That is correct.

(Deposition of Henry J. Reichwein.)

Mr. Lasky: Has the witness seen Exhibit 20 to which you have just referred?

Q. (By Mr. Erskine): Have you seen these, Mr. Reichwein? A. No.

Mr. Erskine: They are the statement of accounts of the United Produce Company. [20]

* * *

Thursday, December 8, 1949

Reconvened, pursuant to adjournment, at the hour of 1:30 o'clock p.m.

Present: As before.

(The taking of said deposition was thereupon resumed, as follows:)

Mr. Lasky: For the record, it is now stipulated by and between the Plaintiff and the Defendant in this case, that the statement which I now hand the Reporter, in writing, shall be incorporated into the record as a stipulation of the parties, binding on them for all purposes throughout this case.

Is that correct?

Mr. Erskine: Yes. [38]

Mr. Lasky: I will now hand the Reporter the document just referred to, and ask that it be copied into the record.

Do you also join in that stipulation, Mr. Todhunter, or are you remaining aloof?

Mr. Todhunter: Does this relate to the question of posting, and so forth?

Mr. Lasky: Yes.

(Deposition of Henry J. Reichwein.)

Mr. Todhunter: May I have just a moment to look at it, please?

Mr. Lasky: Certainly.

Mr. Todhunter: Yes; that is all right.

Mr. Lasky: All right.

(The document just referred to is as follows:

“The practice of the Merchandise National Bank in 1948, with respect to posting debits and credits to commercial ledger account was as follows:

“1. In-clearings received on any given day were posted on that day as debits, but the posting occurred under date of the previous business day.

“2. All counter work, whether debits or credits, was posted on the next business day after the day on which they were handled, but the posting [39] appeared under the date on which they were actually handled.

“3. Consequently, the counter work of a given day and the in-clearings of the following business day appear on the ledger as of the same date.

“4. By ‘in-clearings’ is meant checks presented to Merchandise National Bank through the facilities of the Chicago Clearing House and drawn on Merchandise National Bank.

(Deposition of Henry J. Reichwein.)

“5. By ‘Counter work’ is meant all credits and all debts other than in-clearings.

“6. The daily balance appearing under any given date on a commercial ledger account was a balance which gave effect to counter work credits and debits of that day and to in-clearing debits of the next business day, but not to counter work of the next business day.

“Such a balance was called a noon-day balance’ and did not reflect the actual balance either of the date it bears or of the next business day. Where more than one balance appears as of any day, the last such balance is the noon-day balance as above defined.

“The foregoing method of posting, or variations [40] of it, was adopted and used by many banks throughout the United States during the war as a method of clerical economy. A form of it was used by defendant Bank of America National Trust and Savings Association.”)

Mr. Erskine: Shall I proceed with Mr. Reichwein?

Mr. Lasky: Yes.

HENRY J. REICHWEIN

called as a witness on behalf of the Defendant, having been previously duly sworn, resumed the stand and was examined further upon oral interrogatories, and further deposed and said as follows:

(Deposition of Henry J. Reichwein.)

Direct Examination
(Continued)

By Mr. Erskine:

Q. Now, Mr. Reichwein, you are familiar with the stipulation to which Mr. Lasky has just referred, are you? A. Yes, sir. [41]

* * *

Mr. Erskine: It would seem to me that what you have said could not be strictly correct, because the balance of any given day does include, does it not, Mr. Reichwein, the counter work of that day?

Off the record.

(There followed here an informal discussion outside the record, which was not recorded by the Reporter.)

Mr. Lasky: I am prepared to state it now, Mr. Erskine.

Mr. Erskine: All right.

Mr. Lasky: It is agreed between the parties, for all purposes of this case, that in order to arrive at the true balance in a commercial ledger account of Merchandise National Bank during the year 1948, for any given date, you take the noon-day balance of that day, as has already been defined, and add to it the sum of all in-clearings which are posted under the same date.

The result of any such procedure will always be to increase the balance; if it is a black balance, it will be a greater black balance; and if it is a [47]

(Deposition of Henry J. Reichwein.)

red balance, it will be either a smaller red balance, or a black balance.

Is that correct?

Mr. Tobey: Yes.

Mr. Lasky: Let me make this addition: In stipulating to this, it is understood that the Plaintiff is confining its stipulation at this time strictly to the commercial ledger account, and the statement we have made is subject, of course, when we speak of a true balance, to the existence of conditional credits, and such other qualifications as may be required by the relationship to other ledger sheets of the particular customer of the bank, such as loan accounts, and so forth, if there is such a relationship; so for the moment we are confining ourselves strictly to the face of the commercial ledger account.

Mr. Erskine: I believe I understand what you have in mind, but I do not understand the purpose of it.

What is it you are driving at?

Mr. Lasky: We have used the expression "true balance."

Mr. Erskine: Yes.

Mr. Lasky: And, using that for present purposes, we are trying to distinguish that from the so-called noon-day balance. [48]

Mr. Erskine: Yes.

Mr. Lasky: The so-called true balance, however, is subject to two modifications; there may be conditional credits which have been entered in the com-

(Deposition of Henry J. Reichwein.)

mmercial ledger account, subject to charge-back, if checks come back uncollected; and, secondly, there may be credits in this ledger account which have originated in the Discount or Loan Department, where adjustments of one kind or another may or may not be appropriate, which, if so, would have a necessary reaction upon this ledger account, the commercial ledger account.

In making this stipulation, we want it understood that we do not waive that position, which we may later develop.

Mr. Erskine: Well, as I understand your statement, the stipulation is confined to what appears on the ledger, or the statements of the ledger account.

Mr. Lasky: Yes—the commercial ledger account itself.

Mr. Erskine: Yes. Of course, we do not want to be in the position of stipulating that you are entitled to make any such adjustments.

Mr. Lasky: No, I am not asking you to stipulate that; but in granting my own stipulation about these last [49] definitions, I do it with those qualifications, as to what we reserve the right to contend.

Mr. Erskine: Without any commitment on our part, as to your right.

Mr. Lasky: That is right.

Mr. Erskine: Your right, that is, to pursue the suggestion made in your statement with respect to qualifications.

Mr. Lasky: Correct.

(Deposition of Henry J. Reichwein.)

Mr. Erskine: Well, I think that is all right.

Q. Now, Mr. Reichwein, it appears from what we have just been saying that in order to determine the actual or true balance of the ledger account of United Produce Company as of any particular day, we should add to the balance shown on the ledger, the in-clearing debits of that day, which, under the practice in the bank, are posted as of that day on the next succeeding business day.

That is correct, is it not?

Mr. Lasky: I think that that is what we have stipulated to, yes. A. Yes.

Q. (By Mr. Erskine): Now, I would like to find out from you, Mr. Reichwein, [50] how the in-clearing debits on any particular day to be added to the balance of that day in order to determine the true or actual balance, can be determined—or, to put it another way, can such in-clearing debits be assumed to be all of the debits appearing as of that day, exclusive of the debit memorandums of that day? A. (No answer.)

Mr. Erskine: Off the record.

(At this point there occurred an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Erskine: Now, back on the record.

Q. Your answer to that last question, I take it, Mr. Reichwein is "No"? A. That is right.

Q. The fact is that the debits on any particular

(Deposition of Henry J. Reichwein.)

day may include counter work as well as in-clearings? A. Yes, sir.

Q. And therefore, in order to determine the actual balance, or the true balance of any particular day, you would have to segregate the in-clearing debits from the counter work debits?

A. That is correct.

Q. Now, tell me how that is done. [51]

A. You say, how it is done?

Q. Yes. A. Or how it could be done?

Q. Well, how could it be done at this stage with respect to the Merchandise National Bank ledger account?

A. If you had the debits and the cancelled checks, you could pick out the checks which had been presented through the clearings, and by totaling those, as of the given date, and by adding that amount to the balance which appeared, you would then arrive at what you would call the true balance.

Q. And is that the only way in which it could be done? A. Well—

Q. At this juncture?

A. At which juncture?

Mr. Lasky: At which juncture?

Mr. Erskine: At this time.

Mr. Lasky: Do you mean, now?

Mr. Erskine: Yes, as of the Ledger Account of the United Produce Company in 1948.

Mr. Lasky: Well now, I am a little bit confused. Do you mean, do you want to know how he could do it now?

(Deposition of Henry J. Reichwein.)

Mr. Erskine: How we can do it now, with reference to the United Produce Company account as of the period of time in 1948, during which the account of the United [52] Produce Company was maintained in the bank.

Mr. Lasky: In other words, now, in December of 1949, you want to reconstruct the picture in 1948?

Mr. Erskine: Yes, how can he reconstruct it?

Mr. Lasky: How could he do it?

Mr. Erskine: Yes.

Mr. Lasky: All right.

The Witness: I believe I have answered that.

Q. (By Mr. Erskine): That is the only way?

A. I believe so, yes, sir.

Q. That method would involve the possession of the cancelled checks, would it not?

A. I would say so, yes, sir.

Q. As a matter of fact, you kept a Recordat record, did you not, of all of the debit items that went into the account?

A. I cannot answer that question.

Mr. Erskine: Will it be stipulated that this bank kept a Recordat, that is, in the form of a microfilm, according to my understanding, of all debit items that went into this account?

Mr. Lasky: I think you have marked that Recordat film as one of the exhibits to Mr. Messenger's deposition. [53]

Was that not done? That was Exhibit No. 1.

Mr. Erskine: Off the record.

(Deposition of Henry J. Reichwein.)

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Erskine: Now, back on the record.

Q. As a matter of fact, Mr. Reichwein, your bank from day to day did make an analysis of the United Produce Company Account during 1948, from day to day, the purpose of which was to show the true balance in that account?

Mr. Lasky: You are asking if that was done?

Mr. Erskine: Yes.

Mr. Lasky: Such an analysis, for such a purpose?

Mr. Erskine: Yes.

Mr. Lasky: All right.

A. No.

Q. (By Mr. Erskine): Did you ever make any such analysis?

Mr. Lasky: Of this account?

Q. (By Mr. Erskine, continuing): Of the United Produce Company Account?

A. No, sir. [54]

* * *

Q. Do I correctly understand your answer to mean, Mr. Reichwein, that as of each of the dates on which such a red balance appears, the Merchandise National Bank did not know the true or actual balance of the United Produce Company?

Mr. Lasky: Now, you have expanded your question from what he knew, to what the bank knew?

(Deposition of Henry J. Reichwein.)

A. I will again say "No."

Q. (By Mr. Erskine): Did you, or did any other officer of the bank, on the days on which such red balances, that is, on any of the days on which such red balances appeared, make inquiry to determine what the true or actual balance of the United Produce Company on such day was?

A. If you mean by that, the construction for the application of the figures as you set forth there, actually, not to my knowledge, no, sir.

Q. Well, what was done if anything with respect to such a matter?

A. Those overdrafts, as shown there, were covered by deposits that had been made during the day. [56]

* * *

Mr. Erskine: Will you make that statement for the record, Mr. Messenger, and I will accept it?

Mr. Messenger: Yes.

Counter work, either debits or credits, bear the impression of a teller's stamp on the face of them, on their face.

In-clearings do not bear any impression of a teller's stamp on their face, but do carry on the reverse an IBM impression of date.

Mr. Erskine: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Lasky: The microfilm we have been talking

(Deposition of Henry J. Reichwein.)

about contains a picture of the face of the checks, and of all debit memos, and those pictures contain the necessary data to determine whether each debit item was an in-clearing or counter work, and those contain the information necessary for your reconstruction.

Mr. Erskine: The data to which you refer is this, as I understand it, that the microfilm will show on the checks creating debits, and which constituted counter work, a teller's stamp; whereas, all in-clearing checks will not show on the microfilm any such stamp? [60]

Mr. Messenger: That is correct.

Mr. Erskine: Is that right, Mr. Lasky?

Mr. Lasky: As I understand it, yes.

Q. (By Mr. Erskine): What is your best recollection, Mr. Reichwein, with regard to this point: These exhibits that I have mentioned show as of certain days a red balance. That red balance under our stipulation is a noon balance. What is your recollection as to whether or not on each of such days when a red balance, a red noon balance appears that actually that true balance was a black balance?

A. I will answer that by saying that I do not believe that we had an actual overdraft on the United Produce Company Account, after considering those deposits.

Q. What deposits?

A. That came in during the day.

Q. In other words, the red noon balance was

(Deposition of Henry J. Reichwein.)

converted into a black balance by deposits made during the day? A. That is right.

Q. In each case where a red balance appears?

A. Yes, sir.

Q. You are quite positive about that, are you?

A. I could not be positive without looking at the records because, after all, there was a thirty-day period [61] when I was away on a vacation.

Q. When were you away on a vacation in 1948?

A. September 20th, I believe, until October 18th.

Q. Who was in charge of the account while you were away?

A. Both Mr. LeRoy and Mr. Cottle had something to do with it.

Q. Mr. Cottle? A. Mr. Cottle.

Q. How do you spell the name?

A. C-o-t-t-l-e. I am not so sure that Mr. Cottle had anything to do with it regularly, except maybe on a Saturday if Mr. LeRoy was away, but normally Mr. LeRoy is the one that took over.

Q. So, my understanding of your testimony is, and you tell me if I am correct or not, your best recollection is that the red balances shown on this account which were, under the stipulation, noon balances, were, on each occasion, when such a red balance appeared, converted into a black balance by the close of the day?

A. To the best of my knowledge, that is right.

Q. Now, there was marked in this case upon the taking of the deposition of Mr. Messenger, Exhibit No. 64, which I now show you. That exhibit pur-

(Deposition of Henry J. Reichwein.)

ports to be the form [62] used by your bank as a report on overdrafts, that is correct, is it not?

A. That is part of the overdraft record sheet for a day, I believe, yes, that is correct.

Q. And it was the practice of your bank during 1948, to prepare reports with respect to overdrafts?

A. Daily, yes.

Q. Daily. As I understand it, although I may again be wrong, the report was divided into two different sections, one headed "Overdrafts covered by deposits," and the other "Currency Exchange Overdrafts," is that right?

A. No, sir; there was a division called "Overdrafts," and another division called "Overdrafts covered by deposits," and that currency exchange was another division.

Q. There were three divisions to the report, then?

A. There are more, but when you are referring to overdrafts, there were three, yes, sir.

Q. Now, when there was a noon red balance it would show up on the report of overdrafts, would it not? A. Yes, sir.

Q. And when it showed up the officer in charge of the account or, rather, when it showed up the noon red balance [63] would be called to the attention of the officer in charge of the account, is that right? A. Yes, sir.

Q. It is correct to say, is it not, Mr. Reichwein, that when the noon red balances of the United Produce Company Account appeared on that ledger

(Deposition of Henry J. Reichwein.)

sheet those noon red balances would come to your attention as the officer in charge of the account, during the day? A. Yes, sir.

Q. And that is with the exception of the time that you were away on vacation?

A. That is right.

Q. When such noon red balances would be called to your attention at the same time the checks creating the noon balance would be—that is, the debit items creating the noon red balances would be called to your attention?

A. You mean the presentation of the actual checks?

Q. Yes. A. Not necessarily, no.

Q. On many occasions such checks were presented to you? A. Not in all cases.

Q. But in many? A. That is right.

Q. What time of day would the overdraft report be presented [64] to you?

A. I would say generally that they would have the United Produce Company posted somewhere along about 1:30 or so.

Q. That is, the posting would be done as of that time that would create the noon balance?

A. The noon-day overdraft, that is right.

Q. The noon-day overdraft, as you expressed it?

A. Yes, sir.

Q. And at that time the overdraft report would be presented to you?

A. No, sir; the report was not presented until the next day.

(Deposition of Henry J. Reichwein.)

This overdraft report is made at the end of the day, because it could not be prepared, because we don't know if there were any overdrafts that were covered by deposits until we had had a chance to check the bookkeeping sheet; the bookkeeping sheet would be presented showing the red figure, but this report you speak of would be made up and circularized the next day.

Q. As I understand it, Mr. Reichwein, it was the practice of the bank when a noon red balance appeared in an account for the bookkeeper to present the statement itself, the ledger sheet itself? [65]

A. The sheet, yes.

Q. The ledger sheet itself to the officer in charge of the account? A. Yes.

Q. Whereas the report of the overdrafts was not prepared until the evening?

A. That is right, or probably the next morning, and circularized by eleven o'clock, or some such time.

Q. And the overdraft report of any particular day was circularized on the succeeding business day? A. That is right.

Q. Now, when the bookkeeper presented the sheet to you showing a noon red balance in the United Produce Company account did the bookkeeper at the same time show you the checks constituting the debit items creating that balance?

A. In the majority of cases, yes.

Q. Wouldn't it be accurate to say that in all cases, with the exception of a relatively few?

(Deposition of Henry J. Reichwein.)

A. Yes; I think that is a fair statement.

Mr. Erskine: I wonder if we could take a short recess at this time.

Mr. Lasky: Surely. [66]

* * *

Q. (By Mr. Erskine): When did you first become acquainted with Mr. Rosenthal?

A. About 1905.

Q. Have you known him fairly well ever since?

A. I knew him very well for about four or five years. [85]

Q. After you first met him, Mr. Reichwein?

A. Yes, sir. Would you like for me to tell you just how?

Q. I don't want to go into the details.

A. We played indoor baseball for four or five years. Then I lost track of Mr. Rosenthal and never saw him again, I would say, until 1937 or 1938.

Q. Then did you meet him again in a personal or business way?

A. No; I met him in a business way. He was connected with another produce company and came into this bank and asked if we would be interested in handling some of their business.

Q. Did you handle some of the business of that other produce company? A. Yes, sir.

Q. What was the name of the company?

A. L. Gillarde Company.

Q. Then later on Mr. Rosenthal established the account of the United Produce Company, did he, with the bank here? A. Yes, sir.

(Deposition of Henry J. Reichwein.)

Q. Did you ask him to do that, Mr. Reichwein? [86]

* * *

A. No, sir.

Q. But you knew during 1947 and 1948 that Mr. Oddo was taking a part in the management of the affairs of the United Produce Company?

A. Yes, sir.

Q. You have known, have you not, Mr. Frank C. Lofendo for some time?

A. I do not know Frank C. Lofendo.

Q. Did you ever meet him?

A. Not to my knowledge, no, sir.

Q. Did you ever learn through your contact with the United Produce Company, that a man by the name of Frank C. Lofendo was working for it?

A. No, sir.

Mr. Lasky: Now, just a moment—well, never mind. All right. He has answer "No."

Q. (By Mr. Erskine): Can you state—did you ever meet a man by the name of Gassman in connection with the business of the Merchandise National Bank?

Mr. Lasky: Just a moment.

Q. (By Mr. Erskine, continuing): —that is, with United Produce Company?

Mr. Lasky: If the question is confined to the period [91] prior to November 20th, 1948, I have no objection.

If it is after that period, then I may or may not

(Deposition of Henry J. Reichwein.)

have an objection. What is the purport of your question?

Mr. Erskine: I will confine it to the period prior to November 20th, 1948.

The Witness: Now, what is the question?

Q. (By Mr. Erskine): Did you know Gassman prior to that time? A. Yes, sir.

Q. How long had you known him?

A. I believe, for three or four years. Gassman was the bookkeeper—I am not sure—

Mr. Lasky: Bookkeeper for whom?

The Witness: Of the United Produce Company. I am not sure that he was the bookkeeper at the very beginning, however, but I know he was the bookkeeper for several years.

Q. (By Mr. Erskine): And prior to 1948, you, in connection with your supervision of this account for the bank were in frequent communication with Mr. Gassman, were you not, Mr. Reichwein?

A. I saw Mr. Gassman almost every day. [92]

Q. That is, prior to November 20th, 1948?

A. Yes, sir.

Q. And continuing from, let us say, the 1st of the year of 1948; is that right? A. Oh, yes.

Q. Almost every business day?

A. That is right.

Q. And from time to time you would have a conversation with Mr. Gassman about the affairs of the United Produce Company, would you not?

A. No, sir.

(Deposition of Henry J. Reichwein.)

Q. What would be your business with him when you saw him?

A. Well, Mr. Gassman would bring in the loans.

Q. By "loans," do you mean the accounts receivable?

A. Yes, sir, and he would also bring in the drafts that we were discounting.

Mr. Lasky: And the notes?

The Witness: And the notes, that is right. He would bring them to me, for my o. k.

Q. (By Mr. Erskine): And that was true during all of 1948; is that correct?

A. Yes, sir.

Q. Up to November 20th? [93]

A. Yes, with the exception of the time when I was on my vacation.

Q. Yes?

A. And also on Saturdays, if I happened to be off, or if I was not here when Gassman came in.

Q. Yes. So as I understand you, Mr. Reichwein, Mr. Gassman would bring to you, for example, drafts which the United Produce Company wanted the bank to discount; is that right?

A. That is right, sir.

Q. So that you could o. k. those drafts?

A. Yes, sir.

Q. And he would also bring to you schedules of accounts receivable which were being pledged to the bank to secure its loan to the United Produce Company? A. That is right.

Q. So that you could o. k. those schedules?

(Deposition of Henry J. Reichwein.)

A. That is right.

Q. And when the United Produce Company executed new notes, to evidence part of its indebtedness to the bank, those notes would be brought in by Mr. Gassman, and would be presented to you for your o. k.; is that right?

A. That is right. [94]

* * *

Q. All right. Now, in the case of those duplications, the drafts would also be delivered to you for your o. k., would they not—or, all drafts—let me put it that way, in order to be fair?

In all cases, drafts of the United Produce Company which were being discounted at the bank were submitted to you for your o. k.; is that right?

A. All drafts which were discounted had to be approved—that is correct.

Q. By an officer of the bank?

A. That is right.

Q. And that officer was you, when you were present in the bank, is that correct?

A. Yes, sir.

Q. And you were present in the bank during 1948 on every business day, I take it, except the days on which you were on vacation?

A. Or Saturdays.

Q. Or Saturdays, yes. A. Yes, sir.

Q. Well the bank is closed on Saturday, is it not?

(Deposition of Henry J. Reichwein.)

A. No, sir; the bank just started closing Saturday about three months ago. [101]

* * *

Mr. Lasky: To see whether or not that was true throughout the year 1948, as we believe it to be true of the early months.

Mr. Erskine: Yes.

Mr. Lasky: And if it is so, the stipulation will be corrected accordingly.

Mr. Erskine: Very well. Now, the next point that I want to mention, at the beginning, in order to arrive at what are the correct facts in this case, which we all want to do, I have no doubt, is this: We also took a look at the cancelled checks, drawn by Lofendo to the order of the United Produce Company, which I believe, although I may be mistaken about this, would be applied, according to my understanding, on account of the loan of the Merchandise Bank to the United Produce Company, and which, according to our understanding, would be part of the counter work of the bank and which, therefore, according to Mr. Messenger's suggestion, should bear the teller's stamp in order to distinguish them as counter work from the in-clearings appearing in the account as of the same day.

We find that those checks do not bear such a stamp, and consequently it may not be that the checks actually debited against the account, constituting counter [106] work, bear such stamp, to enable us to segregate such checks from the in-

(Deposition of Henry J. Reichwein.)

clearings debited against the account on the same day.

Now, as I say, that may or may not be a correct statement, but I just want to suggest the point.

Mr. Lasky: This time Mr. Tobey is wrong. Our discussions, and the stipulation of yesterday, had to do strictly with the Commercial Ledger Account.

Mr. Erskine: That is what occurred to me, as I was making the statement.

Mr. Tobey: As you made the statement, that is right.

Mr. Erskine: So I take it, then, we can abandon the point that I have just been discussing.

Now, off the record again.

(There followed at this point a further informal discussion, outside the record, which was not recorded by the Reporter.)

Direct Examination (Continued)

By Mr. Erskine:

Q. Apropos of what I was just saying, I understand the fact to be that checks which are counter work and which are reflected in the statement do bear a teller's stamp?

Mr. Messenger: That is right. [107]

* * *

Q. (By Mr. Erskine): Now, Mr. Reichwein, I believe that your testimony is that when the United Produce Company would make a payment on ac-

(Deposition of Henry J. Reichwein.)
count of its obligation, the bank contemporaneously with such payment would make another loan to the United Produce Company, in the amount of the payment? A. No.

Mr. Lasky: That is not his testimony.

Mr. Erskine: Well, I am asking him.

The Witness: No, sir.

Q. (By Mr. Erskine): Were not the new loans and payments substantially contemporaneous, so that the total amount of the obligation was maintained at the \$200,000 limit?

A. What do you mean by "contemporaneous"—at the same time?

Q. Well, not simultaneous, but on the same day.

A. Now, just what is the question again?

Q. Well, were new loans made to the United Produce Company at about the same time that payments were made by it on account of its obligation to the bank? A. Yes. [158]

Q. On the same day, usually? A. Yes.

Q. Now, at the time new loans were made to the United Produce Company, they would file a new schedule of accounts receivable—that is with each new loan, they would file, as I understand it, a schedule of additional accounts receivable?

A. Yes, sir.

Q. Now I show you here, Mr. Reichwein, Defendant's Exhibit 27, that is, the group of documents marked collectively as Defendant's Exhibit 27 for identification, and I will ask you to just

(Deposition of Henry J. Reichwein.)

glance over that exhibit, if you well, please, that is, that group of documents.

(The documents referred to were examined by the witness.)

Mr. Lasky: Is that 27?

Mr. Erskine: That is the way I interpret it.

The Reporter: That is correct.

Mr. Lasky: Mr. Erskine is a better decipherer of foreign script than I am. Incidentally, that is Exhibit 27 to the Messenger deposition, is it not?

Mr. Erskine: Yes.

The Witness: Yes, sir.

Q. (By Mr. Erskine): You have [159] now examined the instruments in that group of documents, Defendant's Exhibit 27 for identification to the Messenger deposition, have you, Mr. Reichwein?

A. Yes, sir.

Q. Now, when the new loans were made, at the same time the payments were made—or rather, not at the same time, but at about the same time the payments were made—

Mr. Lasky: Following payments, is that what you mean?

Mr. Erskine: Yes, following payments.

Mr. Lasky: All right.

Q. (By Mr. Erskine, Continuing): —each new loan would be evidenced by a note, would it not? A. Yes, sir.

Q. And the note would be accompanied by a

(Deposition of Henry J. Reichwein.)

schedule similar to the schedules in this Messenger Exhibit 27 for identification; is that correct?

A. Yes, sir.

Q. Together with an assignment similar, we will say, to Defendant's Exhibit 27-B for identification.

A. Yes, sir.

Q. And at the time that each such new loan was made, the note evidencing it would be approved by you, would [160] it not?

A. If I was here, yes, sir.

Q. And, at the same time, you would be shown the schedule of the new accounts receivable being assigned to the bank? A. Yes, sir.

Q. That is, you would be shown the accounts receivable—the schedule of the accounts receivable in the form of the schedules in Defendant's Exhibit 27 for identification, Witness Messenger—that is, in the group of documents marked collectively as Defendant's Exhibit 27 for identification.

A. Yes, sir.

Mr. Lasky: Do you mind if I endeavor to clarify something just at this point?

Mr. Erskine: Go right ahead.

Mr. Lasky: If I understand it correctly, Mr. Reichwein, Defendant's Exhibit 27 for identification, Witness Messenger—or that is, the forms which appear collectively as Defendant's Exhibit 27 for identification, and similar forms, were the assignments that were used on any loans made during a month; is that correct?

(Deposition of Henry J. Reichwein.)

The Witness: That is right. [161]

* * *

Q. And at that time you would tell Mr. Eiler—or rather, on some of those occasions, would you tell the Manager of the Bookkeeping Department that you expected, or believed, that the United Produce Company was to make an additional payment on account of its obligation to the bank, and when such payment was made, a new loan would be made by the bank to the United Produce Company, and that at that time the United Produce Company would receive a credit to its account, a credit in the General Commercial Account?

Mr. Lasky: Just a moment. Will you re-read that question, please, Mr. Reporter.

(The question was thereupon read by the Reporter as above recorded.)

Mr. Lasky: Do you understand that question, Mr. Witness?

The Witness: Yes.

Mr. Lasky: You do understand it?

The Witness: I think so.

Mr. Lasky: Well, all right, then; go ahead and answer it. You are being asked whether you told Mr. Eiler that you expected, or believed, that a whole series of things was about to happen.

A. I never mentioned to Mr. Eiler that any payments were expected to be made on the loan. If Mr. Eiler referred [166] to noon-day overdraft to him—

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): "—to me?"

A. (Continuing): I mean, to me, I would approve it, if a credit had already been made to the United Produce Company.

Q. And those credits usually represented new loans, made by the bank to the United Produce Company; is that correct? A. Yes, sir.

Q. So that at the time the noon-day balances were called to your attention, or on many of the occasions when the noon day balances were called to your attention, you knew that on that day such a credit was to be passed to the United Produce Company?

Mr. Lasky: No, that is not what his testimony was.

Mr. Erskine: I am asking him.

Mr. Lasky: He did not testify to that.

Mr. Erskine: I am not saying that he did testify to it. I am just asking him.

A. I did not approve of the overdraft, noon-day overdraft, unless a loan or other deposit had already been made. [167]

Q. (By Mr. Erskine): On that day?

A. On that day, yes, sir.

Q. Which would ultimately be passed to the credit— A. Yes.

Q. (Continuing): —of the account of the United Produce Company? A. Yes, sir.

Q. Now, for example, Mr. Reichwein, referring you to Defendant's Exhibit No. 64 for identification, which was marked on the deposition of Mr. Messen-

(Deposition of Henry J. Reichwein.)

ger, it shows here on the right-hand side "H. R.—Dis.—\$30,948.92," and underneath the "H.R." appears the abbreviation "Coll."

What does that mean, or what does that memorandum which I have just read to you, indicate?

A. This notation indicates that as of this date, a noon-day overdraft appeared on the account of the United Produce Company, of \$30,948.92, and that this overdraft was covered by a loan in the Discount Department, on accounts receivable, and advances on drafts which were credited to the United Produce Company through the Collection Department.

Q. All right. Then can I say, Mr. Reichwein, that that notation was typical of similar notations made on other [168] reports with respect to overdrafts by you, concerning the United Produce Company?

A. That is the usual form in which those reports were prepared—yes, sir.

Q. And that notation—

A. That is the notation that was used—

Q. Yes.

A. —to indicate—

Mr. Lasky: What notation? Pardon me; go ahead; I did not mean to interrupt you.

A. (Continuing): —from which source the credit had been made.

Q. (By Mr. Erskine): Yes, and notations of that sort were frequent on such overdraft reports in the case of the United Produce Company, where those noon-day balances appeared?

(Deposition of Henry J. Reichwein.)

Mr. Lasky: You refer to a notation identical with that?

Mr. Erskine: Not identical, no, but in the same general form.

Mr. Lasky: You mean, notations indicating the character of whatever credit it was?

Mr. Erskine: Yes.

Mr. Lasky: Which countered the supposed overdraft?

Mr. Erskine: That is right. [169]

A. That is correct.

Q. (By Mr. Erskine): Now, when such notations were made, Mr. Reichwein, you of course would inquire as to the source of the credit to be passed to the account of the United Produce Company, I take it, would you not?

A. No, sir. I think I mentioned to you in your testimony here yesterday that this form was prepared at the end of the day.

Q. Yes?

A. And was passed to the officers the following day.

Q. Yes, that is right, you did so testify; but my recollection is—well, at any rate, Mr. Reichwein, your testimony now is, since you have refreshed my memory, that the bookkeeper would call your attention to the appearance of the noon-day balance in the red? A. Yes, sir.

Q. And at that particular time, you would determine whether or not there was any offsetting credit?

A. Yes, sir.

(Deposition of Henry J. Reichwein.)

Q. And when you determined whether or not there was an offsetting credit, you would determine, would you not, how that offsetting credit was to come into existence.

Mr. Lasky: Was to come into existence, or had come [170] into existence?

Mr. Erskine: That is, how it had come into existence.

A. Yes, sir.

Q. (By Mr. Erskine): That is, you would determine, for example, that payments had been made on account of the obligation owing by the United Produce Company to the bank, and that at about on the same day, a new loan was to be made by the bank to the United Produce Company, creating a credit.

That is so, is it not?

A. When I approved the sheet which indicated an overdraft, my approval was based on deposits arising either from loans on accounts receivable, or from credits from the discounting of drafts.

Q. When it was based upon loans, did you know the payments that had been made to the bank at about the same time that the loan was made by the bank to the United Produce Company?

A. The payments were presented to the Discount Department direct. A line was in effect, and my approval always was for the loan, providing it did not exceed the limit of the credit. [171]

(Deposition of Henry J. Reichwein.)

The payment of accounts did not automatically bring about a credit.

Mr. Erskine: I understand that. I was trying to abridge it.

Mr. Lasky: That is the difficulty, when you abridge it you falsify it.

Mr. Erskine: I was trying to abridge it to use but a few words.

Q. (By Mr. Erskine): Now, when the payments which were made, and which were in the usual cases, with certain exceptions, accompanied by loan were made, those payments represented uncollected funds, did they not?

A. You are losing sight of one important point, here, and that is that we have an excess of collateral.

Q. That may be true by way of argument, Mr. Reichwein, but what I am asking you is this, and the answer to it I believe is quite obvious, that the checks representing payments about which we have been talking were uncollected funds until the proceeds of the checks were collected, that is so, isn't it? You knew that?

Mr. Lasky: If I understand that question it means: Were checks uncollected until they were collected?

Mr. Erskine: That is about what it comes [177] to.

Q. (By Mr. Erskine): That is a fact, isn't it?

A. Yes, sir.

Q. And the fact also is that when those payments were made you thereafter made a loan, on that same day you made a loan in the amount of

(Deposition of Henry J. Reichwein.)

those payments, to the United Produce Company, with certain exceptions, that is so, isn't it?

A. No, sir.

Q. What is the fact?

A. It does not necessarily follow that an exact amount was advanced equal to the amount of the payments.

Q. But in the great majority of cases that was so? A. Yes, sir.

Q. Now, did the fact that, did the circumstances that we have just been considering, prompt you to make inquiry as to the checks which constituted these payments, who was drawing these checks?

A. No. sir. [178]

* * *

Q. (By Mr. Erskine): That is, you knew the debtors named in the schedules were the persons making the payments?

A. I assumed that they were.

Q. You knew that payments were being made by the debtors listed in the accounts receivable schedules, did you not? A. Yes, sir.

Q. Now, I think I asked you this before, but I am not positive, so I will have to find out. I show you a telegram, Mr. Reichwein, that was marked on the taking of the deposition of Mr. Etribou, a telegram dated October 20, 1948, and it is addressed to—

Mr. Lasky: If you give me the Exhibit Number I will get my copy. [181]

Mr. Erskine: I haven't the Exhibit Number, the

(Deposition of Henry J. Reichwein.)

number was not put on these exhibits in the file that I have.

Mr. Lasky: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Erskine: Read the question as far as I got.

(The question of counsel was thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): ——J. N. Tarr, Assistant Cashier, Bank of America, and I will ask you if you sent that wire, Mr. Reichwein?

A. Yes, sir.

Mr. Erskine: Mark this as Defendant's Exhibit 2, please.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 2 for identification.)

Q. (By Mr. Erskine): The wire which you just stated is the exhibit that has been marked as Defendant's Exhibit No. 2, is that not correct?

A. Yes.

Q. To follow out Mr. Lasky's numbers, that is the same [182] wire that was marked Plaintiff's Exhibit 4 upon the taking of Mr. Etribou's deposition.

Mark this as Defendant's Exhibit No. 3.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 3 for identification.)

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): I show you a letter that has been marked as Defendant's Exhibit 3, and ask you if that is not the letter referred to in the wire that has just been marked as Defendant's Exhibit 2?

The Witness: Read the question, please.

(The question was thereupon read by the Reporter as above recorded.)

The Witness: I would not know that.

Q. (By Mr. Erskine): Well, I call your attention to the fact that—I was in error in putting that question to you. Defendant's Exhibit 2 states this:

"Suggest you contact your main branch at Fresno, California, who have complete information."

I will ask you, Mr. Reichwein, when you stated that in Defendant's Exhibit 2, did you have reference to [183] Defendant's Exhibit No. 3?

A. Yes, sir.

Mr. Erskine: For the record, Defendant's Exhibit 3 is the same Exhibit as was marked as Plaintiff's Exhibit 6-B upon the taking of the Etribou Deposition.

Now, mark this as Defendant's Exhibit No. 4.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 4 for identification.)

Q. (By Mr. Erskine): I show you what purports to be a copy of a wire which has been marked Defendant's Exhibit 4, and I will ask you, Mr.

(Deposition of Henry J. Reichwein.)

Reichwein, when you prepared your wire, Defendant's Exhibit No. 2, I take it that you had before you Defendant's Exhibit No. 3?

A. Yes, sir.

Q. I am asking you whether you also saw at that time Defendant's Exhibit No. 4?

A. No, sir, I did not.

Q. Now, Mr. Reichwein, I believe you have testified that you did not know what the true, or actual balances in the Commercial Account of the United Produce Company were during the period from July 1st on, during the period covered by the exhibits which have been introduced [184] in evidence upon the taking of these depositions, and when that account showed a noon-day red balance, that is correct, is it?

A. When that account showed a what?

Q. A noon-day red balance?

A. You say that we did not know—

Q. The true balance, true or actual balance on those days?

A. I believe you asked me before whether we had ever constructed or prepared a record of the true balance, that was your question before, I believe.

Q. I think that that was one of my questions. Your answer to that was, "No," as I remember it.

A. That is right.

Q. I also asked you whether or not when the red noon-day balance appeared in the account you

(Deposition of Henry J. Reichwein.)

knew the actual balance: What was your answer to that? A. (No response.)

Q. I will put it to you this way:

When the Commercial Account of the United Produce Company showed a non-day red balance did you personally know the true or actual balance in the account on the days on which those red noon-day balances appeared? A. No. [185]

Q. And that, of course, was true when you sent this wire of October 20th, 1948, Defendant's Exhibit 2? A. Yes, sir. [186]

* * *

Q. (By Mr. Erskine): Now, Mr. Reichwein, in this letter which you say you had before you when you sent your telegram, that is, Defendant's Exhibit No. 3, it says that:

"We hold at their disposal a line of credit to the extent of our legal loaning limit of \$200,000 under special arrangements, and find that they make proper use of those commitments."

Now, at the time you sent your wire did you know what the practice of the United Produce Company was with respect to making payments on account of accounts receivable signed by it to the bank, that is, payments [188] to the bank on that account?

A. What do you mean by the "practice?"

Q. What they did, what the United Produce Company was doing at that time with respect to making payments on account of the accounts receivable it had assigned to the bank?

(Deposition of Henry J. Reichwein.)

A. I think I have testified several times that the United Produce Company made payments on the accounts receivable.

Q. But you did not know the manner in which those payments were being made, did you?

A. The details, no, sir.

Q. And at the time you sent your wire you did not inquire as to the manner in which such payments were being made? A. No, sir. [189]

* * *

Q. (By Mr. Erskine): At the time you sent your wire you were familiar with Defendant's Exhibit 25 on the taking of the Messenger deposition, were you not? A. Yes, sir.

Q. Paragraph 9 of this Messenger Exhibit 25 states:

"Collections on the accounts are to be forwarded in the form in which received, duly endorsed, to the bank daily, on the day on which received at the office of the Company. Daily collection transmittals are [192] to be accompanied by a report identifying the account paid, the assumption being that customer payments received are applied without exception to the indebtedness of that customer oldest in point of time."

When you sent your wire did you make inquiry to determine whether or not the United Produce Company was complying with that provision of Messenger Exhibit No. 25? A. No, sir.

(Deposition of Henry J. Reichwein.)

Q. Your wire states the net worth of the company at over \$80,000. When you made that statement in your wire upon what did you base the statement?

A. The financial statements that had been given to us by the company.

Q. The financial statements to which you refer are the financial statements which we were considering the other day, and which have been marked in this case on the taking of the Messenger deposition as Defendant's Exhibits Nos. 52, 53, 54 and 55, is that correct? A. Yes, sir. [193]

* * *

Q. Nothing occurred prior to that date to suggest to you that that might be the fact?

A. On November 17th, I testified before that I called in Mr. Rosenthal regarding the checks which had been returned.

Q. Yes, but prior to November 17th nothing had occurred of any sort, either in the bank's operations, or no one had told you anything which had led you to suspect that the United Produce Company might be engaged in a kiting operation?

A. I had no knowledge, and never was advised, or knew of anything regarding a kiting operation.

Q. And you did not suspect it prior to November 17th? A. No, sir.

Q. Now what led you, Mr. Reichwein, to call Mr. Rosenthal in on November 17th, in order to discuss with him the affairs of his company?

(Deposition of Henry J. Reichwein.)

What took place at that time, to occasion that action?

A. I called in Mr. Rosenthal because three checks had been returned, which were received in payment of accounts receivable, and those checks were returned for either the reason of "Uncollected Funds" or "Not Sufficient Funds," [204] I cannot just recall.

Q. Who drew those checks; do you remember?

A. Frank C. Lofendo.

Q. And was that the only reason why you called in Mr. Roesnthal on that occasion, that those three checks had been returned, either for "Insufficient Funds," or "Uncollected Funds?"

A. Yes, sir.

Q. Had anything else occurred on that day, or prior thereto, that made you believe that something might be wrong with the affairs of the United Produce Company? A. Absolutely not.

Q. Did anything else occur on that day, November 17th, that prompted you to believe that something might be wrong with the affairs of the United Produce Company.

A. I told you that the checks were presented in the morning, or the checks were brought to my attention in the morning, and I immediately 'phoned Mr. Rosenthal, and asked him to come in.

Q. That is, the three checks? A. Yes.

Mr. Lasky: The three returned checks.

The Witness: Yes.

Mr. Erskine: The three returned checks. [205]

(Deposition of Henry J. Reichwein.)

Mr. Lasky: When they first came to this bank.

The Witness: Yes.

Mr. Lasky: In the morning.

The Witness: Yes, sir.

Q. (By Mr. Erskine): Did you know whether or not other checks of Lofendo had been returned to the bank prior to November 17th?

A. No, sir.

Q. Do you know when the three checks to which you have referred, which were called to your attention, arrived in your bank?

A. (No answer.)

Q. Was it the 17th? A. Yes, sir.

Q. And it was not called to your attention that any other checks of Lofendo had been returned to this bank on a date prior to the 17th? A. No.

Q. You did not know that? A. No, sir.

Mr. Lasky: Do you imply that there were some?

Mr. Erskine: Why, surely, but that is neither here nor there. It is not proper at this time, and I am not going [206] to engage in any argument about the thing.

Q. (By Mr. Erskine): Now, when you called Mr. Rosenthal in on November 17th, Mr. Reichwein, did you have a discussion with him in the bank here? A. Yes, sir.

Q. Did anybody participate in that discussion besides yourself and Mr. Rosenthal?

A. Not at the start, no, sir.

Q. Now, what was said between you and Mr.

(Deposition of Henry J. Reichwein.)

Rosenthal at the beginning of the conversation, before anybody else participated in it?

A. I called his attention to the three checks which had been returned, of Frank C. Lofendo, and I asked him, what was the reason.

Q. What did he say?

A. Well, he said, "I believe if you will put them through again, they will be paid."

Q. Yes? And what else if anything was said in that conversation?

A. Well, then I questioned him as to why these checks were returned, and he mentioned the fact that very likely deposits had been made, but they had not been cleared, and if the checks were again put through, they would be [207] paid.

Q. Was anything else said between you and Mr. Rosenthal before somebody else participated in the conversation, in addition to what you have stated?

A. Yes.

Q. What was that?

A. I questioned him with regard to whether there might be a possibility of any other checks being returned, and he said no; and I repeated the question, and then he said, "Yes, there might be a few more checks returned."

Q. And then what was said in that conversation?

A. Then we discussed the matter further, and he finally admitted that there might be between \$100,000 and \$110,000 in checks which might come back.

(Deposition of Henry J. Reichwein.)

Q. Now then, this all took place before anyone else participated in the conversation, do I understand correctly? A. Yes, sir.

Q. All right. Now, could you tell me in a little more detail, Mr. Reichwein, what the conversation was? Did Mr. Rosenthal say what checks would be returned, or did you ask him what checks would be returned?

A. Yes, sir, he indicated that more checks of Frank C. Lofendo would be returned. [208]

Q. Did he say anything about the checks of anybody else? A. No, sir.

Q. Now, have you told me everything you can tell me with respect to this conversation between you and Mr. Rosenthal which took place on November 17th, before the participation of others?

A. Yes, sir.

Q. And you cannot recall anything else that was said in that conversation? A. No, sir.

Q. Is it not a fact, Mr. Reichwein, that prior to November 17th, certain drafts had been returned to the bank—just prior to November 17th certain drafts had been returned to the bank, drafts drawn by United Produce Company, had been returned to the bank unpaid?

A. I do not know that of my own personal knowledge.

Q. That was not called to your attention prior to the date on which the conversation between you and

(Deposition of Henry J. Reichwein.)

Mr. Rosenthal took place, which has just been mentioned? A. That is right. [209]

* * *

Q. Did you have any conversation with Mr. Rosenthal later on that day? A. Yes, sir. [214]

Q. Or night? A. Yes, sir.

Q. And where did that conversation take place?

A. That conversation took place at the offices of the United Produce Company.

Q. In Chicago here?

A. In Chicago, yes, sir.

Q. And who took part in that conversation?

A. Mr. Riordan, Mr. Royds, Mr. Rudolph, Mr. Tague, myself, Mr. Rosenthal, and Mr. Gassman.

Q. Now, approximately what time in the evening did that conversation take place?

A. I cannot tell you exactly when that conversation commenced, but I believe that it was somewhere in the neighborhood of between seven and eight o'clock.

Q. And how long did the conversation then continue?

A. For maybe an hour, or an hour and a half.

Q. Now, would you tell me what was said in that conversation by the various persons who took part in it?

A. Well, it was a repetition of what we had covered previously, I would say, but at that particular time I suggested to the boys that we all walk out of the room and let Mr. Riordan have a personal

(Deposition of Henry J. Reichwein.)

talk with Mr. Rosenthal, in view of the fact that Mr. Riordan was the bank's [215] counsel.

We all left the room, and Mr. Riordan spoke privately with Mr. Rosenthal.

Q. Now, when you speak of "the boys," you refer to the other officers of the bank who were with you, I take it?

A. Yes—and Mr. Tague.

Q. And prior to that time, did any other conversation with Mr. Rosenthal take place—I mean by that, prior to the time you walked out and left Mr. Riordan with him?

A. Yes, sir; we talked about the matter in a general way.

Q. What was said?

A. I cannot recall the exact words at this time, but I know that Mr. Rosenthal once or twice repeated that he would turn over to the bank his \$20,000 of bonds.

Q. Was there anything else said, that you can recall? A. Yes.

Q. What?

A. Mr. Gassman admitted that he knew something wrong was going on, but that he was merely taking instructions from Mr. Rosenthal.

Q. Mr. Gassman said that to all of you, did he?

A. Yes, sir. [216]

* * *

Mr. Lasky: You have answered.

The Witness: All right.

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): If you cannot separate one conversation from the others—

A. No.

Q. (Continuing): —just tell us then in general what those conversations were, between you and Mr. Rosenthal, that took place in October, and the first part of November of 1948, beginning in October after your return from your vacation?

A. It was regarding the matter of uncollected funds, on the account.

Q. And what was said with respect to that subject?

A. Well, I told him that we wanted him to quit drawing his checks until we had had an opportunity of clearing the checks that he had deposited.

Q. Well, as a matter of fact, Mr. Reichwein, he was not depositing many checks at that time; he was making payments on account of his indebtedness.

Did you refer to checks which he used to make payments on account of his indebtedness?

At that time he was depositing checks in his account.

Mr. Lasky: You were asked the question, whether in the [222] discussion you referred to remittances in the loan department, or whether you were referring to the Commercial Account.

That is what the last question was. You have not answered it.

A. I was referring to the Commercial Account.

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): And only to the Commercial Account— A. Yes, sir.

Q. —and not the payments made on account of indebtedness? A. That is right.

Q. When did you get back from your vacation? A. October 18th.

Q. And in your conversations with Mr. Rosenthal, to which you have just referred, you were referring to deposits made after that date, were you not? A. No; deposits made before that date.

Q. As well as after?

A. I could not refer to deposits made after that date.

Q. Well, that is what I asked you—you did not have those discussions with Mr. Rosenthal as soon as you got back in October, on October the 18th, did you? A. Yes, sir, the very first day. [223]

Q. Did anybody in the bank speak to you about the account, as soon as you returned?

A. Yes, sir.

Q. Who was that?

A. Mr. LeRoy and Mr. Royds; and Mr. LeRoy gave me a memorandum regarding the account.

Q. I see. And did Mr. LeRoy and Mr. Royds say anything to you about the account at that time?

A. Yes, sir.

Q. What did Mr. LeRoy tell you about the account at that time, upon your return from your vacation?

A. He said that he had been in touch with Mr. Rosenthal, and that Mr. Rosenthal agreed that after

(Deposition of Henry J. Reichwein.)

October 18th there would be no further checks drawn unless the funds on deposit had actually been collected.

Q. That is, checks drawn against this Commercial Account? A. Yes, sir.

Q. Against deposits made to his credit in that account? A. Yes, sir.

Q. Did Mr. LeRoy tell you anything else with respect to the account in that conversation?

A. Yes.

Q. What did he tell you? [224]

A. He did mention the fact that he spoke to Mr. Rosenthal, and asked him to arrange to have the funds wired to our credit from California.

Q. From what place in California?

A. I cannot tell you the city.

Q. He stated—that is, Mr. LeRoy told you that he had asked Mr. Rosenthal to establish at this bank, a credit in favor of the United Produce Company by wire from some California bank; is that right?

A. No; he said that he asked Mr. Rosenthal, instead of having checks sent in here, that the funds would be placed to our credit out there, and wired in.

Q. So as I understand you, then, Mr. Reichwein, instead of Mr. Rosenthal bringing a check to the bank, in favor of the United Produce Company, and depositing that check to the credit of the United Produce Company, Mr. LeRoy had suggested to Mr. Rosenthal that the bank upon which such checks

(Deposition of Henry J. Reichwein.)

would otherwise have been drawn, should wire the credit to the Merchandise National Bank; is that right? A. Wire the funds?

Q. Yes. A. Yes, sir.

Q. Now, what else did Mr. LeRoy tell you in that conversation, [225] if anything?

A. I know that he mentioned that he had called in Mr. Rosenthal, and covered that matter with him.

Q. That is, Mr. LeRoy mentioned to you that Mr. Rosenthal had come into the bank during your absence— A. Had been asked to come in.

Q. Had been asked to come in during your absence? A. Yes.

Q. Is that right? A. Yes, sir.

Q. And then you say that Mr. Rosenthal had come in pursuant to that request?

A. Yes, sir.

Q. Did he tell you about the conversation that he had had with Mr. Rosenthal at that time?

A. No, sir, he didn't tell me just exactly what was said in that conversation.

Q. What did he tell you about what had transpired at that time?

A. He told me that he had called in Mr. Rosenthal, and asked him as I told you previously, to arrange to have these funds wired in to the Merchandise Bank, rather than to have checks presented which had to be cleared.

Q. And did you ask Mr. LeRoy at that time to

(Deposition of Henry J. Reichwein.)

what checks [226] for which wires were to be substituted, he had reference?

A. I believe it is in the memorandum.

Q. You have no independent recollection of it?

A. No, sir.

Q. If I were to suggest to you that Mr. LeRoy was referring to checks drawn by Mr. Lofendo to the order of the United Produce Company, upon the East Bakersfield Branch of the Bank of America, would that remind you of what Mr. LeRoy said to you in this conversation?

A. I would not be sure, no, sir.

Q. Do you have any recollection of whether or not Mr. LeRoy mentioned to you in that conversation, Lofendo checks?

A. I believe he did, yes, sir.

Q. What did he say about Lofendo checks; what did he tell you he had told Mr. Rosenthal about Lofendo checks? What you have already stated?

A. Yes.

Q. That the bank wanted the funds wired in?

A. Yes, sir.

Q. Rather than to have the checks presented?

A. Yes, sir.

Q. Now, did he also tell you at that time, Mr. Reichwein, why he had made that request on Mr. Rosenthal? [227]

A. Yes.

Q. What did he say in that connection?

A. He said that he had asked to have the funds wired in, because the United Produce Company

(Deposition of Henry J. Reichwein.)

was drawing checks before the deposits had been collected.

Q. That is, the United Produce Company was drawing against credits established by the deposit to its credit of Lofendo checks, before the funds were collected? A. Yes.

Q. Is that about it? A. That is right.

Q. And he told Mr. Rosenthal that he wanted that practice to stop; is that correct?

A. Yes, sir.

Q. You do not recall at this time any reason that he gave you, any other reason than the one just stated, for making that request upon Mr. Rosenthal?

A. That they were drawing against funds which had not yet been collected?

Q. Yes. A. That is true.

Q. And that was the only reason that he gave you— A. Yes, sir.

Q. —for making that request upon Mr. Rosenthal? [228] A. Yes, sir.

Mr. Lasky: Let the record show, of course, that all of these questions have been asked without submitting to the witness, the memo heretofore produced, on those conversations.

Mr. Erskine: That is right.

Mr. Lasky: And when I say "heretofore produced" I mean, produced on the deposition of Mr. Messenger.

Q. (By Mr. Erskine): Now, Mr. Reichwein, I would like to have you take these exhibits that I am

(Deposition of Henry J. Reichwein.)

about to show you, that were identified upon the taking of the deposition of Mr. Messenger as Defendant's Exhibits 20-BBB through the remainder of the exhibits bearing that No. 20, and also the exhibit marked upon the taking of Mr. Messenger's deposition as Defendant's Exhibits Nos. 21-A to 21-E, and I would like to have you tell me the number of checks shown by the exhibits to which I have just referred, deposited to the credit of the United Produce Company—or rather, I will put it this way:

I would like to have you show me the credits to this Commercial Account of the United Produce Company, which consisted of the deposits of checks to that account, during the period commencing with October 2, 1948, [229] the date shown at the top of this sheet, Defendant's Exhibit 20-BBB for identification, to the Messenger deposition. [230]

* * *

Q. And at the time it made such payments generally speaking with a few exceptions the bank was making loans to, new loans to the United Produce Company, the proceeds of which were credited to the account, that is right, is not not?

A. Yes, sir.

Q. You are quite clear that when Mr. LeRoy told you that he had told Mr. Rosenthal that he wanted Mr. Rosenthal to stop drawing against uncollected funds, Mr. LeRoy had no reference whatever to the checks being received by the bank on

(Deposition of Henry J. Reichwein.)

account of payments being made by the United Produce Company to the bank?

A. I will answer that by saying that Mr. LeRoy never called my attention to any uncollected activity except that arising from the deposit of checks to the Commercial Account.

Q. Did you thereafter inquire whether or not there was any uncollected activity, as we have expressed it, in connection with payments being made by the United Produce Company on account of its obligation to the bank?

A. On accounts receivable? [236]

Q. Yes. A. No, sir.

Q. Now, I am not clear on this. You may have told me. As a matter of fact I think you told me this afternoon, that after returning from your vacation you had a conversation with Mr. Rosenthal, that is right, isn't it?

A. I had several conversations, yes, sir.

Q. And that those conversations related only to uncollected activity in the Commercial Account?

A. Yes, sir.

Q. They related in any way to uncollected activity, as you have expressed it, in the payments being made by the United Produce Company on account of its indebtedness to the bank?

A. Yes, sir.

Q. The answer is yes or no.

A. It related only to the deposits to the account.

Q. It related to—

(Deposition of Henry J. Reichwein.)

A. (Interposing): And it did not relate to the accounts receivable collections.

Q. That is right. And you at that time did not check the payments being made by the United Produce Company to the bank on account of its obligation to the bank, that [237] is, after your return from your vacation, in order to determine whether or not such payments represented what you have called "Uncollected Activity"? A. No, sir.

Q. I think you have said that you had several conversations with Mr. Rosenthal after your return on that point; I believe you testified about those conversations, haven't you? A. Yes, sir.

Q. You have told me everything that you can recall about those conversations? A. Yes, sir.

Q. When you told Mr. Rosenthal that you wanted the United Produce Company to stop drawing against uncollected funds did you tell them, as Mr. LeRoy, according to your testimony, said, that you wanted the bank in California to wire such funds to you?

A. Mr. LeRoy had previous told him that.

Q. Did you repeat that to Mr. Rosenthal?

A. I don't recall that.

Q. You may or may not have?

A. Yes, sir.

Q. Do you know whether or not after your return from your vacation any California bank did wire funds to this [238] bank?

A. I don't recall, no.

(Deposition of Henry J. Reichwein.)

Q. What is your best recollection with respect to that point? A. I cannot be sure.

Q. You have no clear recollection either one way or the other? A. No, sir.

Q. But you did tell Mr. Rosenthal that you wanted him to stop drawing against uncollected funds? A. Yes, sir.

Q. That is, you wanted the United Produce Company to stop drawing against uncollected funds, that is correct, isn't it? A. Yes, sir.

Q. Did the United Produce Company stop that activity?

A. Yes; they did, somewhere along the end of the month.

Q. Along—

A. Along the end of October.

Q. —end of October? A. Yes, sir.

Q. That is, the United Produce Company, commencing along about the end of October drew no checks against the account except against funds that had already been [239] collected?

A. yes, sir.

Q. How long did they continue to do that?

Mr. Lasky: To do what?

Mr. Erskine: Did they continue thereafter to draw only against collected funds?

Mr. Lasky: After what?

Mr. Erskine: After the end of October, towards the end of October, through November.

A. Through the deposits to their commercial account, you mean?

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): Yes, that is right.

Mr. Lasky: There are some double negatives there.

Mr. Erskine: Let me redraft it.

Q. You have stated that commencing towards the end of the month the United Produce Company did comply with the direction given to it by Mr. LeRoy, and thereafter by yourself, to draw only against collected funds? A. Yes, sir.

Q. And what I asked you was, whether or not it continued to draw only against collected funds down to the end, around November 17th to the 20th?

A. May I answer in this fashion, that from that date [240] on their checks weren't drawn against any checks which had been deposited in their account, and which weren't cleared, yes, sir.

Q. Now, when Mr. LeRoy mentioned to you that the checks that he had in mind when he told Mr. Rosenthal while you were away on your vacation that he wanted Mr. Rosenthal, or the United Produce Company, to stop drawing against uncollected funds, were the checks of a man by the name of Lofendo, payable to United Produce Company, was that the first time you had heard of Lofendo in connection with the United Produce Company business?

A. I believe we had received accounts receivable from Mr. Lofendo before that date, but I cannot be sure.

Q. And so far as any discussion between you and any officers of the bank were concerned, was that

(Deposition of Henry J. Reichwein.)

the first time that the name of Lofendo was mentioned? A. Yes, sir.

Q. In your hearing? A. Yes, sir.

Q. Now, I would like to have you look at this Defendant's Exhibit 51, upon the taking of the deposition of Mr. Messenger, that is an exhibit dated January 20, 1948, is it not?

A. Yes, sir. [241]

* * *

A. I shall be glad to identify them for you, if you want me to.

Q. Yes. Whose initials are those?

A. Those are the initials of Frank W. Rudolph, and of Allen LeRoy.

Q. This memorandum states here in the first paragraph:

"We are paying against uncollected funds to prevent overdrafts."

Now, were you aware, Mr. Reichwein, prior to October 1, 1948, that the bank was paying against uncollected funds in the account of the United Produce Company for that purpose,—to prevent overdrafts?

A. It was not brought to my attention, no, sir.

Q. And you did not, as a matter of fact, know that— A. No, sir.

Q. (Continuing): —prior to the date of this memorandum? A. No, sir.

Q. Now, Mr. Reichwein I will call your attention to some handwriting, a notation in handwrit-

(Deposition of Henry J. Reichwein.)
ing appearing at the bottom of this Defendant's Exhibit No. 44 for identification, and I will ask you whose handwriting that is.

Mr. Lasky: Are you trying now to impeach Mr. Messenger? He testified to that.

Mr. Erskine: Did he? [265]

* * *

Q. Prior to November 8, 1948, were you keeping in touch with the United Produce Company account for the purpose of determining the amount of accounts receivable of Alfinito held as collateral, and the amount of the drafts on Alfinito discounted by the bank,—the aggregate of them?

A. Personally?

Q. Yes.

A. No. That duty was delegated to others.

Q. To whom?

A. On the accounts receivable, it was delegated to the Discount Department, and on the drafts, to the Collection Department.

Q. Did they ever call any such facts to your attention prior to November 8, 1948, that you recall?

A. There were several instances, but they again are all a part of the record.

Q. In the memoranda that we have been over?

A. Yes, sir.

Q. This memorandum of November 8, 1948, states that the bank held as collateral and drafts on Feldbaum, an amount [271] aggregating \$184,-933.50.

(Deposition of Henry J. Reichwein.)

I take it that particular fact was not called to your attention at that time?

A. That is correct, sir.

Q. And the concentration or so-called concentration, as that term has been used, in the bank of Feldbaum accounts receivable and drafts, was not called to your attention, except as indicated by the memoranda which have been presented and discussed? A. Yes, sir.

Q. And you personally made no inquiry with respect to that point? A. I could not.

Q. Well, you did not? A. I did not.

Q. That was the question.

A. No, I did not.

Mr. Erskine: That is all.

Mr. Lasky: No! Now, the direct examination, or whatever one may wish to call it, has now been completed, and I will defer any examination that I may have until later, in accordance with our previous understanding.

Mr. Erskine: That is agreeable. [272]

* * *

Direct Examination

(Continued)

By Mr. Erskine:

Q. Was there any discussion between you and Mr. LeRoy after your return from your vacation with respect to the fact that certain debit entries on the statement of the Commercial Account of the United Produce Company consisted of checks

(Deposition of Henry J. Reichwein.)

drawn by the United Produce Company to the order of Lofendo, and that certain credit entries made in that statement consisted of checks drawn by Lofendo to the order of United Produce Company? In [277] other words, checks on both sides.

A. I have previously testified that Mr. LeRoy and I spoke about the uncollected funds against which we had been asked to pay on the account of the United Produce Company.

Q. But there was no discussion, as I understand it, between you and Mr. LeRoy after your return from your vacation with respect to checks on both sides, as just mentioned by me?

A. What do you mean, checks on both sides?

Q. Well, the fact that checks drawn by United Produce Company to the order of Lofendo were being debited to the account of United Produce Company, and the fact that checks drawn by Lofendo to the order of United Produce Company were being credited to the account; was there any discussion of that situation?

A. Not that I recall, no.

Q. Between you and Mr. LeRoy—

A. No.

Q. —after you returned from your vacation?

A. That is right.

Q. I believe you did say the other day, Mr. Reichwein, that after your return from your vacation the sheet which has been marked Defendant's Exhibit 44-B on the [278] taking of Messenger's Deposition was shown to you? A. Yes, sir.

(Deposition of Henry J. Reichwein.)

Q. And that was shown to you, I take it, immediately after your return from your vacation?

A. Yes, sir.

Q. The date on here, 10-18, is in your handwriting, is it not?

A. I'm not so sure, but I will testify——

Mr. Lasky: Wait a minute. You can only answer one question. Is the date in your handwriting?

A. I'm not so sure that is my date.

Mr. Lasky: All right.

Q. (By Mr. Erskine): The initial under the date is in your handwriting? A. Yes, sir.

Q. What is your recollection with respect to the time at which this memorandum, or this sheet, Defendant's Exhibit 43-B on the Messenger Deposition, was shown to you with relation to your return from your vacation?

A. It was shown to me on the date I returned, October 18th.

Q. Now, Mr. Reichwein, did you yourself notice whether or not, prior to your departure for your vacation, checks drawn by United Produce Company to the order [279] of Lofendo being debited against the account, and checks drawn by Lofendo to the order of United Produce Company, were being credited to the account?

A. Did I notice that?

Q. Yes, sir. A. No, sir.

Q. Did you notice whether or not that was the fact after you returned from your vacation?

A. No, sir.

(Deposition of Henry J. Reichwein.)

Q. I am speaking, of course, of the time from the time of your return from your vacation down to November 17th; you understand that?

A. (No answer.)

Q. The answer is "Yes" to that, Mr. Reichwein, for the Reporter? A. You say, did I notice?

Q. Yes. A. No.

Mr. Lasky: When you were asked that question you understood that he was referring down to November 17th.

The Witness: That is right.

Mr. Lasky: Just so we understand, the question referred to down to November 17th. After that he noticed a lot of things. [280]

Q. (By Mr. Erskine): That was the reason, after November 17th, a lot of facts came to your attention? A. That is right.

Q. But prior to, we will say, November 18th, you did not notice that fact? A. No, sir.

Q. And no one called it to your attention?

A. No, sir.

Mr. Lasky: Prior to November 18th?

The Witness: November 17th.

Mr. Erskine: Prior to November 18th, because that would include the 17th.

Mr. Lasky: No. He noticed it on the 17th.

The Witness: I noticed it on the 17th.

Mr. Erskine: Well, then, say prior to November 17th.

The Witness: Yes.

(Deposition of Henry J. Reichwein.)

Q. (By Mr. Erskine): You did not notice that fact? A. That is right.

Q. And no one had called it to your attention?

A. That is right. [281]

* * *

Q. Did you know prior to November 17th, that checks of Lofendo payable to the order of United Produce Company, a large number of those checks, were being used by United Produce Company to apply on account of accounts receivable?

A. No, sir.

Q. Now, I will show you a wire marked Defendant's Exhibit No. 4 in the taking of the LeRoy Deposition, and a translation of that wire marked Defendant's Exhibit No. 4-A upon the taking of the deposition of Mr. LeRoy, and I will ask you if that wire was called to your attention when it was received?

Mr. Lasky: Is that the wire of July 21st—or July 8th?

Mr. Erskine: July 8th, yes.

A. No, sir.

Q. (By Mr. Erskine): That wire was not called to your attention? A. No, sir. [283]

* * *

Q. Was that ever discussed by you with other officers or employees of the bank?

A. I could not discuss it if I did not know about it.

Q. And the same is true of the checks referred

(Deposition of Henry J. Reichwein.)

to in the wire which has been marked Defendant's Exhibit No. 4 on the LeRoy Deposition?

A. What do you mean, the same is true? That I did not discuss it?

Q. That you did not discuss it.

A. Yes, sir; I did not discuss it.

Q. Now, I will call your attention, Mr. Reichwein, to a check for \$22,140, payable to the United Produce Company and signed "Jack's Fruit Company by Jack Oddo," which has been marked Defendant's Exhibit No. 6 upon the taking of the Deposition of Mr. LeRoy, and I will ask you if you had ever had any discussion with any officer or employee of the bank with respect to that check?

A. No, sir.

Q. And that item was never called to your attention? A. No, sir.

Q. And you were never told that the item had been received by your bank, had been presented for payment, [287] and when presented that the item had been rejected? A. No, sir.

Q. And you were never told that thereafter the item was again presented by your bank and then paid? A. No, sir.

Q. In other words, you knew nothing about that item? A. That is right.

Mr. Lasky: Have you finished your questioning of the witness on that subject?

Mr. Erskine: Yes.

Mr. Lasky: You will recall that item took place at a time when Mr. Reichwein was on vacation?

(Deposition of Henry J. Reichwein.)

Mr. Erskine: That is right. I just wanted to find out if he ever knew anything about that item.

Q. I call to your attention, Mr. Reichwein, a debit memorandum which appears on Defendant's Exhibit 21-C on the taking of the Messenger Deposition, as of November 15th, 1948, a debit memorandum in the sum of \$17,516.86; that is an item in that amount with the initials "DM" before it.

A. Yes.

Q. I will ask you whether or not that particular item was ever called to your attention, and whether or not you ever knew about it prior to November 17th, 1948. [288]

Mr. Lasky: Which item is it you are asking about?

Mr. Erskine: This one here (indicating).

A. No, sir; I know nothing of it, and it was never called to my attention.

Q. (By Mr. Erskine): You recall, Mr. Reichwein, that after you returned from your vacation—at least, this is my understanding of your testimony—you were told that Mr. Rosenthal had been advised that the United Produce Company after October 18th should not thereafter be permitted to draw against uncollected funds? A. Yes, sir.

Q. I will ask you, Mr. Reichwein, with particular reference to those instructions given Mr. Rosenthal, whether you do not recall that after your return from your vacation a check drawn to the order of United Produce Company by Jack's Fruit Company for this amount already referred to of

(Deposition of Henry J. Reichwein.)

\$17,512.36, was presented by your bank for payment to the Fresno Branch of the Bank of America, and that payment thereof was refused?

A. I would not know anything about that.

Q. That was not called to your attention at all?

A. No, sir.

Q. To whose notice in the bank would items of this sort, [289] concerning which I have been examining you, the rejection of payment of items—to whose notice would such facts be called?

A. The items would be handled by the Collection Department, who handle all return items.

Q. And the Collection Department, as I understand it, was in charge of Mr.—

A. Koefoot.

Q. —Koefoot? A. Yes.

Q. And Mr. Koefoot, or no one in the collection department, called this last item of \$17,512.36, or the previous item concerning which I have just been examining you, to your attention?

A. It was not called to my attention.

Q. When, after your return from your vacation, Mr. LeRoy called to your attention the instructions with respect to the United Produce Company of not drawing on uncollected funds, did you pass that word on to Mr. Koefoot of the Collection Department? Did you tell him about it? A. No, sir.

Q. Do you know whether he was told about it?

A. I would not know that. [290]

(Deposition of Henry J. Reichwein.)

Cross-Examination

By Mr. Lasky:

Q. Will you state the first date in 1948 upon which you saw any returned and rejected checks, appertaining to the United Produce Company?

A. November 17, 1948.

Q. And can you state at this time what those checks were? A. Yes, sir.

Q. Please do so.

A. They were three checks of Frank C. Lo-fendo. [298]

* * *

Q. Now, I call your attention to a question appearing on page 80 of your deposition, on your direct examination, put to you by Mr. Erskine:

“Q. I will ask you, Mr. Reichwein, whether or not you did not know that when United Produce Company made a payment to you on account of accounts receivable recorded in a [302] memorandum accompanying the payment, such payment would be made on certain occasions, in any case with only one check for the aggregate amount of the accounts receivable recorded on the memorandum rather than in separate checks for each such accounts receivable?”

That question appears not to have been answered, because I could not understand it, and I asked to have it read, and still could not understand it.

Mr. Erskine: And I do not understand it now, from your reading of it.

(Deposition of Henry J. Reichwein.)

Mr. Lasky: I could not understand it at the time.

However, on page 82, the matter was taken up again as follows:

“Q. Now, my question is, whether or not you did not know that such check or checks, in many cases, or some cases, were the check or checks of persons other than debtors named in the memorandum, the debtors to the United Produce Company named in the memorandum?”

Then the answer to that appears as follows—well, no, that was not answered, either; and then it was taken up again on page 83, as follows:

“Q. I believe you have testified that [303] payments were made from time to time on account of the indebtedness of the United Produce Company secured by accounts receivable.

“A. Yes, sir.

“Q. And I believe you testified that such payments were accompanied by a statement or memorandum showing the accounts receivable from which such payments had been derived?

“A. Yes.”

Mr. Erskine: Pardon me, but that should be “accounts receivable.”

Mr. Lasky: That is what it is.

Mr. Erskine: I understood you to say “amounts receivable.”

Mr. Lasky: Well, if I did, I misspoke. The record is “accounts receivable.”

(Deposition of Henry J. Reichwein.)

The Witness: Yes, sir.

Q. (By Mr. Lasky): Did you know, before November 17th, 1948, that that was so, or was that your supposition at the time?

A. I supposed that to be the case; I did not know, before November 17th.

Q. Now, I call your attention further to your deposition, at page 222, as follows: [304]

“Q. If you cannot separate one conversation from the others—— A. No.

“Q. (Continuing): —just tell us then in general what those conversations were, between you and Mr. Rosenthal, that took place in October, and the first part of November of 1948, beginning in October after your return from your vacation.

“A. It was regarding the matter of uncollected funds, on the account.”

Now, Mr. Reichwein, did you have any conversation whatever with Mr. Rosenthal on that subject, the matter of uncollected funds, in November?

A. I would say not, because the matter of uncollected funds on our Commercial Account was cleared up the latter part of October.

Mr. Lasky: Off the record.

(There followed at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Lasky: Now for the record.

Q. On page 239 of your deposition, Mr. Reichwein, the following appears:

(Deposition of Henry J. Reichwein.)

“Q. Did the United Produce Company stop that [305] activity?”

That is, talking about drawing against uncollected funds.

“A. Yes; they did, somewhere along the end of the month.

“Q. Along—

“A. Along the end of October.

“Q. —end of October? A. Yes, sir.

“Q. That is, the United Produce Company, commencing along about the end of October drew no checks against the account except against funds that had already been collected.

“A. Yes, sir.”

Then near the bottom of page 240 of your deposition, the following:

“Q. And what I asked you was, whether or not it continued to draw only against collected funds down to the end, around November 17th to the 20th?

“A. May I answer in this fashion, that from that date on their checks weren’t drawn against any checks which had been deposited in their account, and which weren’t cleared, yes, [306] sir.”

Now, which of those two was correct?

A. Would you mind reading those two answers over again.

Q. Paraphrasing it, one answer is that the

(Deposition of Henry J. Reichwein.)

United Produce Company, commencing along about the end of October, drew no checks against the account except against funds that had already been collected; and the other answer is that their checks were not drawn against any checks which had been deposited in their account, which were not cleared.

A. That second answer is the one that I would like to adopt, and go by.

Q. All right. Now, were there credits in the Commercial Account, entered, which were neither collected checks nor uncollected checks deposited in that account?

A. I do not understand that question.

Q. Well, were there credits entered in the Commercial Account originating in something other than a check deposited in that account?

A. There were credits to the proceeds of loans, yes, sir.

Q. And discounts? A. Yes, sir.

Q. Draft discounts?

A. Yes, sir—accounts receivable or draft [307] credits.

* * *

Q. From time to time during 1948—and my questions are always addressed to a time prior to November 17th, unless I state otherwise, was there any check-up made to determine promptness of payment by the account debtors of the United Produce Company, of their accounts which had been assigned?

A. Do you mean, accounts receivable?

(Deposition of Henry J. Reichwein.)

Q. Yes. A. Oh, yes.

Q. What sort of a check-up was made?

A. Our Field Auditor called at their place of business approximately every thirty days, and checked the payment record of the Accounts Receivable which were pledged to the bank.

Q. And did the Field Auditor then render reports?

A. Yes, sir, a report was rendered each time a check-up was made.

Q. Were those reports called to your [311] attention?

A. Yes, sir, they were.

Q. Did you rely upon them?

A. Yes, sir, I did. [312]

* * *

Q. Now, Mr. Reichwein, how long have you been a banker?

A. Since 1908, with the exception of three years when I was an instructor in banking and finance at the La Salle Extension University.

Q. What banks have you been with in that period?

A. From 1908 to 1922, with the Fort Dearborn National Bank of Chicago; from 1922 to 1925, as I have explained, I was instructor of banking and finance at the La Salle Extension University; from 1925 to 1933, I was [315] vice-president, for two years, and then was President of the State Bank of West Pullman, Chicago, Illinois, which was until May 30th, 1933; and since June 1st, 1933, I have

(Deposition of Henry J. Reichwein.)

been with the Merchandise National Bank, having started as cashier, later becoming vice-president and cashier, and as I explained, a few years ago the cashiership was handled by somebody else for a period of three or four years, but since the latter part of November, 1948, I was again vice-president and cashier.

Q. How many years have you been with banks which financed produce dealers?

A. Approximately twenty-five years.

Q. Have you been with banks that financed a large amount of items for produce dealers, had a large amount of the business?

A. The Fort Dearborn National Bank of Chicago, handled more produce business, and to a great extent specialized in the handling of that type of business.

Q. What experience have you had in the matter of lending on the basis of assignment of accounts of produce companies and the discounting of drafts of produce companies? For how many years?

A. Over twenty years.

Q. Will you state the type of shipping document which [316] is customarily used in the shipping of perishable produce? State from your experience.

A. From my experience, the order bill of lading was strictly an exception. The documents used in most cases were delivery orders.

Q. Can you state the reason for this usage?

A. Because of the perishable nature of the merchandise. They had to have some form of document

(Deposition of Henry J. Reichwein.)

that would facilitate the handling and eliminate the danger of spoilage, because of the perishable nature, and the delivery order answered that need.

Q. Now, can you state in round figures how many drafts during your years of experience, you have handled the discounting of on perishable produce?

A. That is impossible, but it is in tens of thousands.

Q. What is the customary kind of security taken on the discount of drafts covering shipments of perishable produce, in your experience?

A. A draft is drawn with an invoice attached, and a delivery order.

Q. Accompanying the draft? A. Yes, sir.

Q. For how long had Merchandise National Bank discounted drafts for United Produce Company, prior to [317] November 17th, 1948?

A. Three years.

Q. During that period of time can you state, in round figures, the number of drafts which Merchandise National Bank discounted for United Produce Company?

A. Oh, I would say six or seven thousand.

Q. Along that magnitude? A. Yes, sir.

Q. Let me ask you this question: Were there other customers of this bank for whom you handled the discounting of drafts accompanied by delivery orders? A. Oh, yes; we had several.

Q. Now, getting back to United Produce Company drafts, do you know of any case, any instance, where there was a car covered by a draft which was

(Deposition of Henry J. Reichwein.)

delivered to anyone without Merchandise Bank's releasing the delivery order?

A. Will you read that question, please?

(The question referred to was read by the Reporter as above recorded.)

Q. (By Mr. Lasky): There was no such case?

A. No, sir.

Q. Was there ever a case of a diversion of a car—

Mr. Erskine: Pardon me. I wonder if you would read [318] that last question for me, please.

(The question was read by the Reporter as above recorded.)

Mr. Erskine: Thank you.

Mr. Lasky: I started another question. How far did I get, Mr. Reporter?

(The question was read by the Reporter as above recorded.)

Q. (By Mr. Lasky, continuing): —without Merchandise Bank's consenting to the diversion and taking a substitute draft in lieu of the first one?

A. Not to my knowledge, no, sir.

Mr. Erskine: That is, as far as you know?

The Witness: As far as I know. I never heard of one.

Q. (By Mr. Lasky): No such instance was ever called to your attention? A. No, sir.

Q. Either before or after November 17th, 1948?

A. No, sir.

(Deposition of Henry J. Reichwein.)

Q. Were there many or few drafts discounted for United Produce Company, accompanied by the delivery orders, which were returned to Merchandise Bank unpaid, of all that were handled for United Produce Company in the three [319] years you have mentioned?

A. You mean, when drafts were refused?

Q. That is what I want to know. Were there many or few?

A. Very, very few. I would say less than half a dozen.

Q. Were all drafts discounted for United Produce Company accompanied by delivery orders, or were some accompanied by bill of lading?

A. I believe most of them, practically all of them, were accompanied by delivery orders.

Q. Were there any unaccompanied by either a delivery order or bill of lading? A. No, sir.

Q. How long has Merchandise National Bank been engaged in financing business, extending loans on the basis of assigned accounts receivable?

A. Since 1933, to my knowledge.

Q. To your personal knowledge?

A. My personal knowledge, and—

Q. How long—pardon me.

A. (Continuing): —and from a check-up of the records I made when I came in, I know such advances were made since 1933. [320]

Q. For how long has Merchandise National Bank financed business, made loans, and extended

(Deposition of Henry J. Reichwein.)

credit on the security of general assignments of accounts receivable?

A. I believe since about 1945 or 1946, or thereabouts.

Q. What part has Merchandise National Bank played in financing business on the basis of security of assigned accounts receivable?

Mr. Erskine: Pardon me. Would you read that question, please?

(The question referred to was read by the Reporter as above recorded.)

A. We are known as the pioneers of that type of financing by banks in the Chicago area.

Q. (By Mr. Lasky): Will you state from your experience what need there is for this mode of financing?

A. Well, there is definitely a need for this type of financing. There are a lot of firms whose financial condition does not warrant granting any unsecured credit, and the financing of their receivables, or the handling of their receivables, enables the bank to furnish credit where otherwise they could not obtain it, and that is very, very particularly true in the case of a company [321] that is growing, when their need for credit greatly exceeds the amount of credit that a bank could give them on an unsecured basis, and by pledging their accounts receivable they can get, or the bank can give them, more money than they could give them on an unsecured basis.

Q. When Merchandise National Bank embarked

(Deposition of Henry J. Reichwein.)

upon this program of financing business on the basis of assigned accounts receivable, was there any experience relative to procedure, manner of conduct, manner of operation or manner of policing such assignments upon which it could draw in the Chicago area, to your knowledge?

A. You mean with banks?

Q. With banks, is what I mean, yes.

A. No. As I told you, we were the pioneers among the banks in this area for this type of financing.

Q. Did Merchandise National Bank, as it went along with this type of financing, develop and devise its own procedures?

A. Oh, yes, we did, and as different needs arose, different things came up, we naturally revised our set-up and our records and the check-ups we made to cover the new items that we learned as we went along.

Q. Let me ask you this question: Has Merchandise [322] National Bank learned something from its experience with United Produce Company?

A. Is this on the record?

Q. Yes. A. Definitely.

Mr. Lasky: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Mr. Lasky: I have no further cross-examination. The witness is yours for redirect.

(Deposition of Henry J. Reichwein.)

Redirect Examination

By Mr. Erskine:

Q. According to the practice about which you have been testifying, Mr. Reichwein, a general assignment is an assignment of all accounts receivable to the company being financed to secure its loan, is that right?

A. Yes. That is the general idea.

Q. And when such an assignment is taken, it is also part of the practice to have a field auditor to check the books of the company from time to time, is it not?

A. Yes. The field auditor made checks, whether or not the advances were made on a general assignment or [323] specific assignment.

Q. The field auditor made such a check in either case? A. Yes.

Q. Was it part of the practice to have the field auditor checks the accounts receivable on the remittance sheets accompanying payments made by the borrower to the bank, in order to determine whether or not—to make such check of the remittance sheets with the books of the company, in order to determine whether or not the company was remitting all of the receipts received by it on account of accounts receivable covered by the general assignment?

A. That is a long question. May I have it read?

Mr. Erskine: Yes. The Reporter will read it.

(Deposition of Henry J. Reichwein.)

(The question was read by the Reporter as above recorded.)

A. In the first part of that question you refer to accounts receivable. I wonder if you do not mean checks in payment?

Mr. Erskine: Will you read the question again, please, Mr. Reporter.

(The question was again read by the Reporter as above recorded.) [324]

Q. (By Mr. Erskine): Pursuant to your suggestion, Mr. Reichwein, let me ask you this: The practice was for a company borrowing money on such a general assignment to make remittances of amounts collected by it on account of accounts receivable, was it not? A. Yes.

Q. And when such a borrower made such remittances, it accompanied the remittances with a list of accounts receivable collected by it, together with the amount of such accounts?

A. Yes, sir.

Q. The question that I was putting to you was this: Was it your practice to check the accounts receivable, or was it the practice to have the field auditor check the accounts receivable listed on such a remittance sheet, with the books of the company, for the purpose of determining whether the company was remitting all of the accounts receivable collected by it and covered by its general assignment?

A. Whether or not the field auditor used those

(Deposition of Henry J. Reichwein.)

remittance sheets to do his checking, I cannot say; but the field auditor in every case checked the receipts of a borrowing customer to see that all of the funds had been [325] remitted to us which they had received in payment of accounts receivable.

Q. You do not know whether he made a check of the remittance sheets against the books, but you do know that according to the practice he made a check of the books to determine whether or not the customer was remitting all of the funds which he had collected on account of accounts receivable?

A. Yes, sir.

Q. Now, in answer to one of the questions put to you by counsel, you said that practically all of the drafts discounted by the bank—let me put the question to you this way:

In answer to the questions put to you by Mr. Lasky on cross-examination, did you mean to say that practically all of the drafts discounted by the bank for the United Produce Company were accompanied by delivery orders? A. Yes, sir.

Q. And such delivery orders were in the form of the delivery order attached to this bankruptcy claim which was marked for identification upon the taking of Mr. Messenger's deposition as Defendant's Exhibit No. 32, the form to which I refer being the delivery order I [326] am now showing to you which is dated 10/16/48, and it says, "Please deliver to J. Alfinito & Sons, Inc.," signed "Rosenthal," and attached to which is a draft drawn by the United Produce Company upon Alfinito & Sons, Inc., for the sum of \$5,187.50?

(Deposition of Henry J. Reichwein.)

Such delivery orders were in that form, were they not?

A. That is the usual form, yes, sir.

Q. Now, according to the practice you have described, the draft discounted by the bank was accompanied by a delivery order and an invoice—

A. Yes, sir.

Q. (Continuing): —the invoice being in the form of the invoice attached to the delivery order about which I was just questioning you?

A. Yes.

Q. Now, what was done with the draft, the delivery order, and the invoice, after you had discounted the draft?

A. They were forwarded to a city in which the person on whom the draft was drawn was located, for collection.

Q. To a bank in such city?

A. Yes; or if we did not have a direct correspondent, [327] through some other bank that would contact or notify this person that there was a draft drawn against them.

Q. Were the drafts accompanied by any instructions to such correspondent bank?

A. I know that our usual form of collection letter was sent with such drafts, yes.

Q. Do you have the usual form of collection with you in the bank here?

A. I do not have any here.

Q. Could you get one?

(Deposition of Henry J. Reichwein.)

A. I am sure we could.

Mr. Erskine: Would you please get one, Mr. Messenger?

Mr. Messenger: Yes.

Mr. Erskine: In the meantime, I will go on to something else.

Q. (By Mr. Erskine): Now, in your cross-examination you stated, as I have your testimony written down here, that you do not know of any case when a car covered by a draft discounted by Merchandise National Bank for the United Produce Company was delivered to anyone without Merchandise Bank's releasing the delivery order. That was about what you said, was it not?

A. Yes, sir. [328]

Q. That is, so far as you know that is the case?

A. Yes, sir.

Q. Now, what did you mean in that answer, when you said that such car was not delivered without Merchandise Bank's releasing the delivery order? What did you mean by that?

A. That such a car would not be released until the draft which accompanied it had been paid.

Q. That is, released by the railroad company?

A. No; released by the bank that was handling the collection. When a bank handled the collection and received payment, the delivery order would be released by them.

Q. To the person paying the draft?

A. Yes.

Q. And that is what you meant by that answer?

(Deposition of Henry J. Reichwein.)

A. That is right.

Q. What is, when the draft was paid, the delivery order accompanying it was delivered to the person paying the draft? A. That is right.

Q. Now, Mr. Reichwein, you testified that when a noon-day red balance appeared on the commercial ledger card of the account, on each day on which that appeared during [329] the year 1948 you knew that there was a black balance, is that correct? That is what you testified, as I remember it.

A. Yes.

Q. But you did not know the amount of the black balance, did you?

A. The exact amount, no, sir; I would not know.

Q. When you say "the exact amount," do you mean that you knew the amount within a few hundred dollars?

A. Yes, sir, but not pennies, or anything like that.

Q. Yes. On each occasion when a noon-day red balance appeared on the statement of the commercial account, you knew that the true balance on that day was a black balance, and you knew the amount of such black balance within a few hundred dollars either side?

A. I knew that there would be a black balance, yes, sir.

Q. And did you know the amount of it within that approximation?

A. Oh, it is hard to say within a couple of hundred dollars on an account that ran that large. I

(Deposition of Henry J. Reichwein.)

will say that I knew that we had sufficient deposits to make that a black balance as of that date.

Q. That is, that would be a black true balance?

Mr. Lasky: Yes. [330] A. Yes.

Mr. Lasky: As distinguished from these noon-day things.

The Witness: Yes. That is right.

Q. (By Mr. Erskine): But do I understand your testimony to be that you did not know what the amount of the true black balance would be?

A. The exact amount, I did not know.

Q. Well, the word "exact" puzzles me. What do you mean by that?

A. Well, to the last penny. When we speak of a balance we include pennies.

Q. Yes. Well, to come back to that, Mr. Reichwein, is it a correct statement of your testimony to say that you knew the correct true balance in such cases within, we will say, \$500.00 either side of what the true balance might actually have been?

A. I think that is fair. [331]

* * *

Recross-Examination

By Mr. Lasky:

Q. On cross-examination I asked a question to the effect whether there ever was an instance, in the case of United Produce Company, of any car covered by a draft being delivered to anyone without a release by Merchandise National Bank of the delivery order, and on redirect examination you testified something to the effect, as I got it, that you

(Deposition of Henry J. Reichwein.)

meant that the delivery order was not released to the consignee without the draft being paid. Is that what I understood you to say?

A. Yes, sir; no delivery orders were given up unless the draft was paid. [336]

Q. But now my question is, was the car of merchandise referred to by the invoice which accompanied the draft ever delivered to anybody without the delivery order first being released to the person who obtained the merchandise?

Mr. Erskine: If the witness knows.

A. Not to my knowledge; I never heard of it.

Mr. Lasky: That is what I understood you to testify the first time. That is all.

Redirect Examination

By Mr. Erskine:

Q. When you used the expression "consignee," you meant the drawee of the draft? A. Yes.

Mr. Lasky: I meant the drawee of the draft. That is a much more correct expression.

Mr. Erskine: That is all.

Mr. Lasky: I guess that is all, then.

Mr. Erskine: Yes. That concludes the depositions here.

And further the witness deposed and said not.

(Witness excused.)

/s/ HENRY J. REICHWEIN.

[Endorsed]: Filed May 22, 1950. [337]

[Title of District Court and Cause.]

DEPOSITION OF WILLIAM EDWARD
TAGUE

* * *

Thereupon:

WILLIAM EDWARD TAGUE

called as a witness on behalf of the defendant, having been first duly sworn, was examined upon oral interrogatories, and deposed and said as follows:

Direct Examination

By Mr. Erskine:

- Q. What is your full name, please, Mr. Tague?
A. William Edward Tague.
Q. Where do you reside? A. Chicago.
Q. By whom are you employed?
A. Merchandise National Bank.
Q. In what capacity?
A. You are referring to the present time, or to the time in which this case comes?

Q. At present.

A. At the present time I am doing special work in the auditing department.

Mr. Lasky: Pardon me. Before the deposition goes further, I want the record to show that the position we take is that since Mr. Tague is an employee and not an officer of this bank, you cannot take his deposition as that of an adverse party, and cannot ask leading questions, [±*] and are otherwise

* Page numbering appearing at top of page of original Reporter's Transcript.

(Deposition of William Edward Tague.)

bound as if he were a stranger to the case; the same position we took with respect to Mr. Koefoot.

Mr. Erskine: I will not make any comment on your observation, but I want it understood that I am not bound by it, of course.

Mr. Lasky: You are not bound by what I say, unless what I say is the law.

Mr. Erskine: I cannot accept that. Will you read the last question and answer, please, Mr. Reporter.

(The record was thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): What sort of special work, Mr. Tague?

Mr. Lasky: Now, just a minute. What Mr.—well, I will withdraw my objection.

Mr. Erskine: I want to know what he is doing.

A. I have been working primarily on charged-off assets.

Q. (By Mr. Erskine): Now, in November of 1948, and part of that time, what were you doing for the bank?

A. At that time I was assistant credit manager and chief field auditor.

Q. How long had you been occupying this position? [5] A. Approximately two years.

Q. Are you an accountant by profession, Mr. Tague?

A. No. I have stuck to banking and finance. I happen to know accounting by virtue of my educa-

(Deposition of William Edward Tague.)
tion, but I could not consider myself an accountant since I have never practiced.

- Q. How long have you been with banks?
- A. I was an examiner for four years.
- Q. An examiner for the controller's department?
- A. The Pennsylvania Department of Banking.
- Q. Before you came to this bank?
- A. Yes.
- Q. And how long have you been with this bank?
- A. Three years. [6]

* * *

Q. What is your recollection, your best recollection, with respect to that matter?

- A. I believe I discussed it with Mr. Rudolph.
- Q. Did you have any discussion of it with Mr. LeRoy? A. Yes.

Q. Now, this memorandum in the second paragraph states, "Mr. Gassman explained that lots of grapes are purchased by the grower (or agent) for cash."

That is a sentence in the second paragraph. To whom did you refer by the use of that term "grower (or agent)," Mr. Tague?

A. I believe the last sentence in the memorandum covers that.

- Q. That is, the sentence reading as follows:
"The foregoing transactions are recorded in the accounts of Mazzie Farms, Fresno, California; Jack's Fruit Company, Fresno, California, and Frank C. Lofendo, Bakersfield, California"?

(Deposition of William Edward Tague.)

Those are the people to whom you referred as "grower (or agent)"? A. Yes. [11]

Q. Will you tell me the conversation between you and Mr. LeRoy with respect to this memorandum?

A. I do not think I would remember that conversation.

Q. Can you remember the substance of it?

A. The substance of it was the explanation as set forth in my report there of what actually happened.

Q. Was there any discussion with reference to what is stated in the second paragraph of the memorandum?

A. To what do you refer, specifically?

Q. The practice described in the second paragraph of the memorandum.

Mr. Lasky: By "second paragraph," you refer to the one which begins, "The company's records reveal that this activity stems from three accounts," and so forth?

Mr. Erskine: That is right, yes.

Mr. Lasky: Your question is whether there was any discussion with Mr. LeRoy about that paragraph?

Mr. Erskine: Yes. That is right.

A. I think only to supplement my memorandum, such questions as he might have had at that time.

Q. (By Mr. Erskine): By that, I understand that such discussion was repetitive of what you said in the memorandum, is that right?

(Deposition of William Edward Tague.)

A. Exactly. [12]

Q. Did Mr. LeRoy make any comment with respect to what you described in the second paragraph? A. Not that I recall.

Q. Was there any discussion between you and Mr. LeRoy at that time with reference to the fact that on the commercial account of the United Produce Company with this bank, checks drawn by United Produce Company to the order of Lofendo were being charged against the account, and on the credit side checks drawn by Lofendo to the order of United Produce Company were being credited to the account?

Mr. Lasky: Just a minute. I did not hear that question because of some commotion at one end of the table. Will you read the question to me, please, Mr. Reporter.

(The question was thereupon read by the Reporter as above recorded.)

Mr. Lasky: That is a question that can be answered yes or no.

A. I would say no.

Q. (By Mr. Erskine): There was no discussion with respect to the fact that such checks were on both sides of the account? A. No.

Q. The answer is "No"? [13] A. No.

Q. Was there any such discussion at any time between you and LeRoy?

Mr. Lasky: At any time prior to November 17th?

(Deposition of William Edward Tague.)

Mr. Erskine: Yes. At any time prior to November 17th.

A. No.

Q. (By Mr. Erskine): Did you ever notice that fact in your investigation of the company?

A. No.

Q. You never noticed those checks on both sides of the account? A. No.

Q. The answer is "No"? A. No.

Q. As far as you know, there was no discussion between you and any other officer or employee of the bank prior to November 17th, 1948, concerning that circumstance?

A. There were no discussions of that particular circumstance.

Q. In which you took part?

A. In which I took part.

Q. Now, Mr. Tague, did you make periodical audits of the United Produce Company for the bank? [14] A. Yes.

Q. Do you know whether or not the United Produce Company maintained a book called the cash receipts book? A. They did.

Q. Do you recall the type of items entered by the United Produce Company in such book?

A. I am not certain, but I believe the cash receipts ledger contained only the total of the day's receipts.

Q. Did it set out the debtors—I will withdraw that.

Were you aware, at the time you made these

(Deposition of William Edward Tague.)
audits, that United Produce Company had assigned
accounts receivable to the bank as collateral?

A. Yes.

Q. Did that cash receipts book set out payments
received from the debtors whose accounts receivable
had been assigned to the bank?

Mr. Lasky: I am sorry, but I did not get that
question. Will you read it to me, please?

(The question was thereupon read by the
Reporter as above recorded.)

A. No.

Q. (By Mr. Erskine): You are quite clear that
that is the fact? A. Yes. [15]

Q. Did the names of the debtors making the
payments on account of such accounts receivable
appear in any record of the United Produce Com-
pany examined by you?

A. The accounts receivable, yes.

Q. In what record did United Produce Com-
pany record such payments?

A. In the accounts receivable ledger, as a credit.

Mr. Lasky: I understand these questions refer
to the books of United Produce Company?

Mr. Erskine: That is right.

The Witness: That is right.

Q. (By Mr. Erskine): In other words, in the
accounts receivable register, the names of the debt-
ors whose accounts had been assigned to the bank
as collateral, appeared? A. Right.

Q. And the amount owing by them to the United
Produce Company? A. Yes.

(Deposition of William Edward Tague.)

Q. Those entries were not made in the cash receipt book of the United Produce Company?

A. Not specifically.

Q. That is, the debtors were not named, but only the aggregate? [16] A. That is right.

Q. The aggregate of daily payments?

A. That is right. [17]

* * *

Mr. Lasky: "By schedule" you refer to—

Mr. Erskine: Schedules in the form of Defendant's Exhibits 29-PP on the taking of the Messenger Deposition, and by remittance sheets, I refer to sheets in the form of Defendant's Exhibits 41-C on the taking of the Messenger Deposition.

Mr. Lasky: I have the same objection to that question on the grounds of ambiguity, that I expressed before.

A. Well, frankly—well, I will just say no.

Q. (By Mr. Erskine): You never noticed that?

A. No.

Q. Did you ever check, in any of your audits of the United Produce Company, the payments shown on the remittance lists in the form of Defendant's Exhibit 41-Z, for example, in order to determine whether or not the remittances specified on such sheets conformed with the payments shown by the books of the Company to have been received from its debtors? A. No.

Q. You never made any check of that sort at any time [21] in connection with these audits?

(Deposition of William Edward Tague.)

A. What do you mean by "of that sort"?

Q. Well, of the nature described in my question, checking the list—

A. Checking lists—

Q. Checking the remittances specified in the list in order to determine whether or not those remittances conformed to the books of the company.

A. That is, the individual remittance?

Q. That is right. A. No.

Q. Or any group of remittances, any individual group of remittances? A. No.

Q. Did you check the schedules in the form of Defendant's Exhibit 29-PP with the books of the company for the purpose of determining whether or not the accounts receivable described in such schedule conformed with the accounts receivable as described on the books of the company?

Mr. Lasky: Do you know what 29-PP is?

A. Yes.

Mr. Lasky: Your "Yes" is in response to Mr. Erskine's question? [22]

The Witness: Yes.

Q. (By Mr. Erskine): Did you make such a check each time you made an audit? A. Yes.

Q. But as I understand you, you did not check the remittance sheets against the accounts receivable for the purpose of determining which of the debtors named on the schedules were making remittances?

Mr. Lasky: That has been answered several times.

(Deposition of William Edward Tague.)

Mr. Erskine: I want to make sure.

A. No.

Q. (By Mr. Erskine): Putting it in the converse order, did you ever check to determine whether or not payments as recorded on accounts receivable on the books of the company, were listed in the payments specified in the remittance sheets?

Mr. Lasky: The same question, over and over again.

Mr. Erskine: No. That is the converse of it.

A. That can be answered either way.

Q. (By Mr. Erskine): What is your answer?

A. I will say yes. [23]

Q. In other words, you did check to determine whether or not payments as shown by the books of the Company to have been received on account of accounts receivable, were specified on the remittance lists? A. Yes.

Q. Or remittance sheets? A. Yes, sir.

Q. On any such check, Mr. Tague, did you discover that payments were shown on the remittance lists which were not shown to have been received on the books of the company? A. No.

Q. You always found that they conformed?

A. Yes.

Q. Now, when you say you checked the payments received on accounts receivable as recorded on the books of the company, with the remittance lists and the record of the company—

A. Wait a minute. I did not say that.

(Deposition of William Edward Tague.)

Q. I understood you to say that you checked the payments received on account of accounts receivable as recorded on the books of the company, with the payments received by the bank as listed in the remittance sheets. Did you? [24]

A. Not specifically.

Q. Oh. There we are coming to the point about which I was going to ask you. What accounts on the books of the company did you check against the remittance sheets?

A. The total receipts in any one day would equal the total of the remittance sheet for that particular day.

Q. The total receipts on any one day as shown by the—

A. Accounts receivable themselves, or the cash receipts, would equal the total on the remittance sheets.

Q. And you made that check, did you?

A. Yes.

Q. Now, to what book of the company did you refer in making that check of the United Produce Company?

A. To the accounts receivable and the cash receipts.

Q. To both ledger sheets showing the accounts receivable and the cash receipts books, is that right? A. Right.

Q. Was that check confined to the total daily receipts on account of accounts receivable received by the Company, and the total amount specified in

(Deposition of William Edward Tague.)

the remittance sheets as having been paid to the bank?

Mr. Lasky: Will you read that question to me, please.

The Witness: Yes. Repeat that, please.

(The question was thereupon read by the Reporter as above recorded.) [25]

A. Let's answer that "Yes."

Q. (By Mr. Erskine): In other words, in making that check, you did not make a check with respect to any specific accounts receivable, but confined yourself to the aggregate daily receipts?

A. No.

Q. Well, what did the check comprise, then?

A. Well, it—

Q. Describe the check you made in that respect.

A. The daily cash receipts as recorded in the cash receipts ledger agreed in all cases with the total receipts as listed on the remittance sheet.

Q. And was that the only point that you checked, Mr. Tague?

A. Wait a minute. I am not through.

Q. Go ahead.

A. The total of that remittance sheet that particular day was tied in with the individual accounts receivable.

Q. On what? On the books of the company?

A. On the accounts receivable ledger.

Q. Yes.

A. To give me a check on their own cash re-

(Deposition of William Edward Tague.)

ceipts. Then their own cash receipts were verified against [26] the total on the remittance sheet for the day, which in turn determined our control balance.

Mr. Erskine: I do not thoroughly understand that. I will have to ask the Reporter to read it back to me slowly, so I can write it down.

(The answer of the witness was thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): What is a control balance?

A. The balance on the accounts receivable ledger—I mean on the—yes, our accounts receivable ledger.

Q. That is, you keep a ledger of the accounts receivable assigned as collateral to the bank, do you?

A. Yes; the outstanding balance.

Q. And the balance on that ledger is your control balance, is that right? A. Exactly.

Q. Now, you say, Mr. Tague, that the total of the remittances on a particular day was tied in with the individual accounts receivable on the accounts receivable ledger to give you a check on their own cash receipts. Referring, as an illustration, to Defendant's Exhibit No. 41-Z on the taking of the Messenger Deposition, I will ask you what is the total as shown by that [27] remittance sheet, 41-Z, as the amount remitted by the United Produce Company on account of accounts receivable?

A. \$97,288.32.

(Deposition of William Edward Tague.)

Q. Now, do I understand, just by way of illustration, that you tied in that total with the individual accounts receivable as listed of the company, in order to determine what accounts receivable listed on the books of the Company made up that total?

A. It would work out that way, yes.

Q. So you made a check in order to determine from the books of the company what specific accounts receivable as shown on such books made up the total of the remittances recorded on a remittance sheet?

A. On that particular day, yes.

Q. On that particular day? A. Yes.

Q. Well, do I understand that in order to determine whether or not the total amount received, or total amount remitted on account of accounts receivable as shown by any remittance sheet, was checked by you against the book of the company, the United Produce Company, known as the accounts receivable ledger, for the purpose of determining what specific accounts [28] receivable recorded in the accounts receivable ledger made up the total recorded on the remittance sheet?

A. Yes and no.

Q. Just explain that answer.

A. Let us say that our records on a particular day indicated the receipts, as we have on that particular day, of \$97,000. Their cash receipts would indicate the same figure—their cash receipts ledger, that is.

(Deposition of William Edward Tague.)

Q. As recorded on the cash receipts book?

A. Right.

Q. Yes.

A. An adding machine tape of the posting to the accounts receivable ledger as of the same date should agree with the cash receipts ledger, and in turn with our remittance. If it did not, obviously something was wrong.

Mr. Erskine: I wonder if you would—have you finished your answer?

The Witness: Yes.

Mr. Erskine: Will you read the last couple of sentences please, Mr. Reporter.

(The record was thereupon read by the Reporter as above recorded.) [29]

Q. (By Mr. Erskine): Now, as I understand that answer, the cash receipt book of the United Produce Company would show a figure as of a particular day agreeing with the figure shown on the remittance sheet? A. Yes.

Q. Then you say that an adding machine tape of the posting to the accounts receivable ledger—right there I would like to have the Reporter mark for me a tape attached to Defendant's Exhibit 38-C on the Messenger Deposition, as Exhibit 1 on the taking of Mr. Tague's Deposition.

(The document referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 1 for identification.)

(Deposition of William Edward Tague.)

Mr. Lasky: Why mark that tape? It is part of the exhibit.

Mr. Erskine: When you referred—

The Witness: I am not referring to that tape.

Mr. Erskine: I am about to ask you that.

Q. (By Mr. Erskine): When you refer to an adding machine tape of the posting to the accounts receivable ledger as of the same date as any remittance would agree with the cash receipts ledger, do you refer to a tape in the form of [30] the tape that has just been marked Tague Exhibit 1 for identification?

A. I refer to a regular adding machine tape which I ran off at the time I was making the audit.

Q. Did you run off that tape that has been marked Tague's Exhibit 1? A. No.

Q. Do you know who did run off that tape?

A. No.

Q. Then as I understand it, you, in making these checks, would add up certain items appearing upon the books of the United Produce Company, is that right? A. Yes.

Q. Would you add up certain items appearing on the cash receipt book, or on the accounts receivable ledger?

A. On the accounts receivable ledger.

Q. You would make that addition in order to determine whether or not the amount of the remittance aggregated the amount of the accounts on the accounts receivable ledger, is that right?

(Deposition of William Edward Tague.)

A. The amount of accounts receivable listed in the accounts receivable ledger.

Q. Would equal the amount of the remittance?

A. Exactly. [31]

Q. Did you compare the amount of your tape with the amount shown as having been—I will withdraw that.

Did you compare the items, or each figure shown on your tape, with each figure shown in the remittance sheet as having been remitted on accounts receivable? A. No. That was impossible.

Mr. Erskine: I ask that the last part of the answer go out as being non-responsive to the question, and argumentative.

Q. (By Mr. Erskine): Did you compare the amount of the accounts receivable as shown in the accounts receivable ledger with the accounts receivable listed in the remittance sheet?

Mr. Lasky: Will you read that question to me, please, Mr. Reporter.

(The question was read by the Reporter as above recorded.)

Mr. Lasky: Of course, that assumes something that is not so, namely, that the items listed on the remittance sheet were necessarily accounts receivable, and something other than what they are supposed to be—remittances. It is an assumption that has prevailed throughout your examination of numerous witnesses. [32]

Q. (By Mr. Erskine): Well, now, to sum this

(Deposition of William Edward Tague.)

thing up, as I understand here—I may be wrong—you did not compare the individual payments as shown by the accounts receivable ledger of the United Produce Company, with the individual remittances shown on the remittance sheets?

A. No.

Q. In checking this remittance sheet, as, for example, Defendant's Exhibit 41-Z, did you notice that the remittance sheets from time to time showed debtors making payments—or rather, that one of the debtors making payments was Lofendo Distributing Company? A. Yes.

Q. Did you notice that the remittance sheets showed that the Lofendo Distributing Company was making payments repeatedly? A. No.

Q. Did you ever compare the amount of any such remittance having been made by the Lofendo Distributing Company with the accounts receivable ledger of the company for the purpose of determining whether or not the ledger showed an accounts receivable in the amount being remitted by Lofendo Distributing Company?

Mr. Lasky: That question has been asked and answered [33] in one form or another several times. A. I answered that.

Q. (By Mr. Erskine): By the answer "No," is that right? Your answer was "No"?

A. I did compare it, naturally, in the run of the tape.

Q. But that is not what—

A. Which we formerly mentioned.

(Deposition of William Edward Tague.)

Q. But that is not what I asked you, Mr. Tague.

Mr. Lasky: I think it is.

Q. (By Mr. Erskine): I am asking you whether or not you compared a remittance not only in amount, but in name, as appearing on the remittance sheet with the accounts receivable ledger for the purpose of determining whether the accounts receivable ledger of the company showed that Lofendo Distributing Company was indebted to the company on account of accounts receivable in the amount shown by the remittance sheet as being remitted and received by the company from Lofendo?

A. No.

Q. The answer is "No"? A. No. [34]

* * *

Q. (By Mr. Erskine): Now, Mr. Tague, I want to clear up, not an ambiguity, but something that was unusually involved, even in my own question, particularly the last question that I put to you.

Mr. Lasky: Are you suggesting that the answer was even more involved than the question?

Q. (By Mr. Erskine, continuing): Therefore, I will ask you this: I will ask you whether or not you compared the remittance, the specific remittance shown on the remittance sheet, not only in amount, but in the name as appearing on the remittance sheet, with the Accounts Receivable ledger of the United Produce Company for the purpose of determining whether such remittance, specific remittance, shown on the remittance sheet, was likewise shown in the Accounts Receivable ledger of the Company?

A. No.

(Deposition of William Edward Tague.)

Q. Your answer is "No"? A. "No."

Q. Now, I will ask you, in the second place, Mr. Tague, whether you compared each amount shown on the adding machine tape which you mentioned in your testimony previously, made from the credits in the individual [37] accounts receivable ledger of the United Produce Company, with the individual amounts shown on the remittance sheet relating to payments as of the same day as the day of the payments shown in the individual accounts receivable ledger? A. No.

Q. Now during the recess, Mr. Tague, did you examine these exhibits, Defendant's Exhibits for identification 49-A to 49-G inclusive, upon the taking of the Messenger Deposition?

A. Yes, sir.

Q. All right. Let me ask you a few questions about them, then.

Each one of these exhibits is in the same form, is it not? A. Yes, sir.

Q. And when I say "in the same form" I mean, they have the same list of questions?

A. That is right.

Q. And each question on each list has the same number as the same question on the other lists?

A. Yes, sir.

Q. Question 5 on Defendant's Exhibit 49-A for identification reads: [38]

"Were there delays or failures to settle with bank for collections and credits?"

Mr. Lasky: May I see one of those forms, please.

(Deposition of William Edward Tague.)

Mr. Erskine: Yes.

Mr. Lasky: So that I can follow your questions.

Mr. Erskine: Yes.

Q. And the answer to that question—or rather, let me withdraw that, and put this question to you:

Opposite each question on each of these lists appear the words "Yes" and "No" with a parenthesis before each of those words. A. Yes.

Q. And when you put an X-mark in those parenthesis before either one of those words, you intended to indicate your answer, did you not?

A. Yes.

Q. Now, coming down to the fifth question on the list of questions, "Were there delays or failures to settle with bank for collections and credits?" your answer to that, is indicated on Defendant's Exhibit 49-A for identification, is "No."

Will you tell me what investigation you made for the purpose of determining your answer to that question? I might add that Defendant's Exhibit for identification [39] 49-A refers to the audit made as of 10/25/48.

A. Well, we will have to again go back to the cash receipts, received daily, which were checked against the accounts receivable.

Q. The ledger? A. The ledger.

Q. Yes?

A. (Continuing): And tied back into the amounts which we received daily, which gave us our control.

(Deposition of William Edward Tague.)

Q. And in answering that question, Question No. 5 on the list, you followed the procedure which you have outlined in your previous testimony?

A: Yes, sir.

Q. Now, coming down to 6, Question No. 6, on this list:

“Do majority of receivables”——

Mr. Lasky: Referring to each of the auditor's reports.

Mr. Erskine: Each of the auditor's reports in this group of Exhibits marked 49.

Mr. Lasky: Yes.

Mr. Erskine: Let me start over again.

Q. Question No. 6 says:

“Do majority of receivables pay under invoice terms?”

On Defendant's Exhibit 49-A for [40] identification you have marked the answer to that question as being “Yes.”

Now I would like to have you tell me what investigation you made for the purpose of making that answer, Mr. Tague.

A. We received at the end of each month the complete trial balance, of which you have a copy among your Exhibits there.

Q. Yes?

A. That trial balance was a listing of accounts receivable, and would indicate anything which was past due. It was a rare instance in which anything was past due.

(Deposition of William Edward Tague.)

That, you will find, is covered by Government regulations; they must pay within a certain period of time.

Q. In your reference to a trial balance in your answer just made, Mr. Tague, are you referring to forms similar to Defendant's Exhibits for identification 30-A and 30-B, on the taking of the Messenger deposition? A. Yes.

Mr. Lasky: Show them to him.

Mr. Erskine: Yes.

Mr. Lasky: To make sure that is it.

The Witness: Well, that is it, I am sure—yes, 30-A [41] and 30-B.

Q. (By Mr. Erskine): Does that Exhibit list any accounts receivable as being past due?

A. No.

Q. Did any of those instruments in the form of Defendant's Exhibits 30-A and 30-B, just shown you, Exhibits on the taking of the Messenger deposition, ever indicate that accounts receivable were past due, so far as you can recall?

Mr. Lasky: Will not the documents speak for themselves?

Mr. Erskine: I am asking for his recollection of the facts.

Mr. Lasky: Is his recollection material?

Mr. Erskine: I think it is.

A. I do not remember any having been past due on the regular terms.

Q. (By Mr. Erskine): In determining your answer to Question 6, you relied upon the sheets

(Deposition of William Edward Tague.)

submitted by the United Produce Company to the bank, in the form that I have just shown you, marked Defendant's Exhibits for identification 30-A and 30-B? [42]

A. No, not completely.

Q. What else did you investigate?

A. We always scanned the ledger sheets for anything past due.

Q. In other words, you took a look at the ledger accounts receivable of the company?

A. That is right.

Q. You examined them? A. Yes.

Q. For the purpose of determining whether or not any of the accounts receivable specified thereon were past due? A. Exactly.

Q. Now, the seventh question of these audit reports, in the group of documents marked as Defendant's Exhibits 49 for identification, says:

"Do they have adequate collection follow-up?"

On Defendant's Exhibit 49-A for identification, you answer that question "Yes."

What investigation did you make for the purpose of determining whether or not the United Produce Company had an adequate collection follow-up?

A. That was a verbal investigation, in which I said, "What do you do if an account does not pay within the [43] specified five days?" and I was shown wires, and memos of telephone calls, and all that sort of thing, which would be adequate, in my estimation.

(Deposition of William Edward Tague.)

Q. Yes. That is, you were shown those things, and told those things by employees of the United Produce Company? A. Yes, sir.

Q. To whom you addressed your inquiries?

A. Yes, sir.

Q. On that point? A. That is right.

Q. Now in Question 8 here, in the group of Exhibits marked Defendant's Exhibit 44 for identification, it says:

"Were remittances allocated to proper invoice?"

Now before I come to your answer to that question, show on Defendant's Exhibit 49-A for identification, let me ask you: Does the word "remittances" there refer to the remittances shown on the remittance sheets, the forms of which have been shown you?

A. We do not consider them to be, no, sir.

Q. The expression "remittance" used in that question, had reference to the remittances received by the company [44] itself?

A. That is right.

Q. Now, getting back again—

Mr. Lasky: Just a moment. Let me hear that last question and answer, please, Mr. Reporter.

(The record was thereupon read by the Reporter as above recorded.)

Mr. Lasky: I have no objection to that question so long as it is understood, as I understand it, that

(Deposition of William Edward Tague.)

you are referring to the witness' understanding of the question.

Mr. Erskine: Of the term used in the question.

Mr. Lasky: That is, the witness' understanding—

Mr. Erskine: Yes.

Mr. Lasky: —of the term used in Question No. 8.

Mr. Erskine: Yes.

Mr. Lasky: All right.

Q. (By Mr. Erskine): Your answer was a statement of your understanding of the term, as used in the question, was it, Mr. Tague?

A. Yes.

Q. Question No. 8? A. Yes, sir.

Q. Was your understanding of the term "remittances" as [45] used in that question, the same thing as the item based on the tape which you have mentioned, which was added up?

A. No, sir, it would not be the same thing, because in remittances, we are allocating to one individual account.

Q. I see.

A. Rather than a number of accounts.

Q. Now, tell me, Mr. Tague, what did you do in determining whether or not some particular remittance was allocated to the proper invoice.

A. We worked in totals. In other words, if the trial in one month would indicate a certain balance,

(Deposition of William Edward Tague.)

then the trial in the next month should be the balance, less the remittances, plus additions.

Mr. Erskine: Will you let me hear that answer again, please, Mr. Reporter.

(The answer was thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): Now, when you refer to the "trial" in one month, you refer to instruments similar to Defendant's Exhibits for identification 30-A and 30-B, which I have shown to you; is that correct? A. Yes, sir. [46]

Q. And when you refer to the balance shown on the trial of one month, you refer to a balance similar to the balance shown on this Defendant's Exhibit 30-B for identification, that is, the figure of \$469,050.13; is that correct?

A. The total of those columns and accounts.

Q. Yes. And in the case of these Defendant's Exhibits 30-A and 30-B for identification, on the taking of the Messenger Deposition, the balance is the amount I have stated; is that correct?

A. Yes, as I remember it.

Q. Now, Mr. Tague, do I correctly understand you to say that in answering question No. 8, already referred to, you just checked the total on what you call the trial balance—or rather, let me put the question this way:

Do I correctly understand you to say that in order to answer this Question No. 8, what you did was to take the total of one month, shown on what

(Deposition of William Edward Tague.)
you have called the trial balance of that month,
and that you then deduct from such balance the
payments received during that month, and add the
additional accounts receivable added during that
month?

The Witness: Would you repeat that?

Mr. Erskine: Read it, please. [47]

(The question was thereupon read by the Re-
porter as above recorded.)

Mr. Erskine: Let me put the question again.

Q. In other words, as I understand you, Mr. Tague, in answering this question No. 8, you took a trial balance similar to these Defendant's Exhibits 30-A and 30-B, which was as of August 28th, 1948, and you deducted from it the payments made on account of the accounts receivable listed thereon during the succeeding month, that is, along somewhere toward the September of 1948, and then you added to it the accounts receivable assigned during the period, from the date of Defendant's Exhibits for identification 30-A and 30-B, to the date of the succeeding trial balance—is that correct?

A. Rather than add to it, the accounts receivable, let us say, I always checked the sales figure, which would be the same thing.

Q. Yes. And is that the investigation which you made in answering Question No. 8, on Defendant's Group Exhibit No. 49?

A. That was one of the checks that I made.

Q. What other check did you make?

(Deposition of William Edward Tague.)

A. It was the normal practice to take a specific account, and do that. [48]

* * *

Cross-Examination

By Mr. Lasky:

Q. Mr. Tague, you are not an officer of the Merchandise National Bank, are you?

A. No, sir.

Q. And you never have been? A. No.

Q. I believe you testified that you had been an Examiner for the Pennsylvania State Banking Department? A. That is right.

Q. When you were employed by the Merchandise National Bank, did you state to the bank your previous experience? A. Yes.

Q. Now, were you assigned the task of making periodic audits of the books of customers of the bank who were borrowing from the bank on the basis of accounts receivable? A. Yes.

Q. And among those whose books you would audit periodically, were the United Produce Company? A. Yes. [60]

Q. And was the purpose of your periodic audit, to ascertain whether or not the debtor was complying with the terms of the arrangement under which credit was being extended to it?

A. Yes, sir.

Q. How frequently did you make audits of the books of the United Produce Company?

A. Approximately every thirty days.

(Deposition of William Edward Tague.)

Q. The audits were field audits? A. Yes.

Q. That is to say, you went to the office of the United Produce Company itself? A. Yes, sir.

Q. And audited its books there?

A. Yes, sir.

Q. Did you have any specific day of the month upon which to call upon the United Produce Company? A. No.

Q. So that the United Produce Company did not know the day when you would call upon it?

A. No, sir.

Q. And then after you made your periodic monthly audit, you prepared a report, did you?

A. Yes, sir. [61]

Q. And are the forms which have just been examined upon, and which have been marked for identification as Defendant's Exhibits 49-A to 49-G, inclusive, the reports which you made during the year 1948? A. Yes.

Q. After you prepared those reports, what did you do with them?

A. I turned them over to Fred Rudolph, Credit Manager, and they were in turn circulated to the officer in charge of the account.

Q. And do those forms and reports, Defendant's Exhibit 49-A and the following letters for identification, on the Messenger Deposition, bear on their face in each case, certain initials?

A. Yes.

Q. What do those initials signify?

(Deposition of William Edward Tague.)

A. That the officer had seen, and presumably read, the report.

Q. Did you use your judgment and experience as an Examiner, to determine what procedures to follow in making your audits? A. Yes.

Q. Were you informed by any superior as to the details, or the methods that you were to pursue in making your [62] audits, or were you left to answer the questions on the forms in such manner as, based on your experience, you deemed appropriate?

A. The first part of the question, I will answer this way: At times I was informed to look for this, or to look for that; it would be said, "We would like you to take a look at this, or at that."

In the second place, the answer to these questions were formulated by me, based upon my audit of what I deemed necessary.

Q. Were there some accounts in the bank which you audited periodically, which were cases of specific assignments rather than general assignments?

A. The majority of the accounts were specific assignments.

Q. And some were general assignments?

A. Yes, sir.

Q. The account of the United Produce Company was a general assignment? A. Yes, sir.

Q. Was the manner of your audit the same, or different, in auditing a customer's books who borrowed on basis of specific assignments, from what

(Deposition of William Edward Tague.)
was done in the case of those who borrowed on the basis of general assignments? [63]

A. On basis of the specific assignments, we checked each item specifically, all credits, and all additions.

On basis of general assignments, we were interested in totals, as tied into cash receipts and sales.

Q. When you say "we," I take it you refer to yourself? A. Yes.

Q. In making the audit?

A. Yes, sir. We usually went on the general assignment, because the volume was so great that a specific assignment was impractical.

Q. Mr. Tague, I show you here a group of checks which appear not to have ever been passed through the bank, which have been marked as Plaintiff's Exhibits 17-A through 17-S, both inclusive, on the taking of the Deposition of Gassman, each on purporting to be a check drawn by the United Produce Company on the Merchandise National Bank, and each one purporting to have on its back a rubber stamp endorsement of the name Frank C. Lofendo, and none of them having any bank stamp on them.

Will you look at these checks, please, and tell me whether or not you have ever seen them before?

(The witness examined the checks.)

A. Yes. [64]

Q. Where did you first see those?

(Deposition of William Edward Tague.)

A. These were the checks which were in Gassman's desk.

Q. When?

A. At the time that this thing blew up, and I went down there as the bank's representative, to sort of ride herd on things.

Q. Well, translating that term into ordinary English language, what did you do?

A. Well, they were in Gassman's desk on the 17th.

Q. Of November— A. Yes.

Q. —1948? A. Yes.

Q. You went down to the United Produce Company office that day? A. Yes, sir.

Q. What time of day?

A. About two-thirty.

Q. And some time during that day you say you found that group of checks in Mr. Gassman's desk?

A. Not that day, no, sir—not that specific day.

Q. Oh. Well, when did you find them there?

A. It was several days later. [65]

Q. I see. Now, just a moment. I show you here Defendant's Exhibit 44 for identification, marked on the Messenger Deposition.

Was that a report made by you? A. Yes.

Q. Now, when you answered certain questions that were put to you by Mr. Erskine, I believe you testified that one of the reasons for your making an investigation upon the basis upon which you prepared that report, was, if I get your testimony correctly, because of the high volume of checks,

(Deposition of William Edward Tague.)

or business being done. I ask you now: Done where; in what account at this bank?

Was it the Commercial Account that you were referring to? A. Yes, sir. [66]

* * *

Q. All right. Now, when you made your audit, did you compare—I just want to be sure that I understand your testimony—the total cash receipts as shown on the books of the United Produce Company, with the tape of the postings of the Accounts Receivable Ledger? A. Yes, sir.

Q. And with the daily remittance totals?

A. Yes, sir.

Q. Did you find that they reconciled, or compared? A. Yes, sir, always.

Q. At the time you were making your audits and investigations of the United Produce Company books, did you know that the books of the United Produce Company were "doctored" books?

A. Definitely not.

Q. Or that they were fictitious?

A. Definitely not, no, sir. It was one of the best kept sets of books that I ever saw in my life.

Q. And they deceived you? [68]

A. (Witness nodding head affirmatively.)

Mr. Erskine: Well, now, just a moment. I think that is not proper cross-examination, calling for his conclusion. He says he did not know that they were fictitious.

Mr. Lasky: Well, you have your objection, and the witness answered by a nod of his head.

(Deposition of William Edward Tague.)

Now will you give your answer so that the Reporter can get it. The question was: "They deceived you?"

A. I did not know that they were "doctored" books.

Q. (By Mr. Lasky): And you were deceived?

A. Yes, sir.

Q. Did you know, at the time you were making your audit and investigation, that there were any invoices in the records of the United Produce Company which were fictitious? A. No, sir.

Mr. Erskine: Now, just a moment. That assumes something that is not in evidence, that there were any invoices in the records of the United Produce Company that were fictitious.

Mr. Lasky: Do you deny that fact? [69]

Mr. Erskine: Well, can we agree that there were fictitious entries in the books of the United Produce Company?

Mr. Lasky: Can I agree?

Mr. Erskine: Yes.

Mr. Lasky: I know of no reason why we cannot agree, if we get together on it.

Mr. Erskine: Well, it might facilitate the trial of this case, if we could reach a stipulation with respect to that.

Mr. Lasky: Upon the basis of what everybody has discovered since November 18th, 1948, I do not see any reason why we cannot agree to a thing like that.

(Deposition of William Edward Tague.)

Mr. Erskine: Well, do you have some sort of stipulation in mind?

Mr. Lasky: I have not up to this point tried to formulate anything, no, but I do not see any reason why we cannot, because apparently you take the position, just as we take the position, that that is a fact.

Mr. Erskine: That is what we have assumed.

Mr. Lasky: Yes.

Mr. Erskine: And I think it is probably the fact.

Mr. Lasky: Well, we know it to be a fact now.

Mr. Erskine: Yes. [70]

* * *

Redirect Examination

By Mr. Erskine:

Q. You referred to the officer in charge of the account, that is, the United Produce Company account. You knew that was Mr. Reichwein, did you not? A. Yes, sir.

Q. You stated that where there was a specific assignment of accounts receivable, you checked the remittances received by the bank on account of such accounts against the specific accounts receivable assigned, but when there was a general assignment of accounts receivable, you checked only the totals. That is right, is not not? A. Yes.

Q. But when there was a general assignment of accounts receivable, you did make, as I understood your testimony, from time to time a random check

(Deposition of William Edward Tague.)

of specific accounts receivable against remittances—or, let me put it the other way: You did make a random check of the remittances against the specific accounts receivable; is that correct?

A. I made a check of the total remittances against specific accounts receivable, but not the individual remittances.

Q. That is, as explained in your direct testimony? [74] A. Yes, sir.

Q. The answer to that question then is "Yes"?

A. Yes, sir.

Q. You said you were sent down to the offices of the United Produce Company at two-thirty on November 17th. Who sent you down to that office at that time? A. Mr. Rudolph.

Q. And what did he tell you at that time?

A. He said, "Go down to the United Produce Company and meet Arthur Royds down there."

Q. And did you meet Arthur Royds down there?

A. Yes.

Q. Did Mr. Rudolph say anything more than that?

A. I think he said, "There is trouble there," or something to that effect. Naturally, he was not going to talk over the 'phone.

Q. And you met Mr. Royds? A. Yes.

Q. Did Mr. Rudolph say anything more at that time? A. No.

* * *

[Endorsed]: Filed April 14, 1950. [75]

[Title of District Court and Cause.]

DEPOSITION OF ARTHUR V. ROYDS

* * *

Mr. Erskine: Will you swear the witness, please?

Thereupon:

ARTHUR V. ROYDS

called as a witness on behalf of the Defendant, having been first duly sworn, was examined upon oral interrogatories, and deposed and said as follows:

Direct Examination

By Mr. Erskine:

- Q. What is your full name, please, Mr. Royds?
- A. Arthur V. Royds.
- Q. Your residence?
- A. In Downers Grove, Illinois.
- Q. Are you an officer of the Merchandise Bank?
- A. Yes.
- Q. How long have you been an officer?
- A. I think about twelve years; I'm not just sure.
- Q. What is your present office?
- A. Assistant Vice President.
- Q. How long have you occupied that office?
- A. For about three years.
- Q. Do you work in any particular department of the bank?
- A. I am in the Loaning Division now.

(Deposition of Arthur V. Royds.)

Q. Loaning Division? A. Yes. [4*]

Q. Is there such a department of the bank as the Collection Department? A. Yes.

Q. Are you in charge of that department of the bank? A. No.

Q. Were you in charge of it in 1948?

A. No.

Q. Did you have anything to do with it?

A. No.

Q. There is a department known as the Discount Department, is that right? A. Yes.

Q. Have you had anything to do with the Discount Department of the bank?

A. Yes. I was the manager.

Q. Of that department? A. Yes.

Q. You were manager— A. In 1948.

Q. For the last four years you have been the manager of the Discount Department of the bank, the Merchandise Bank?

A. Well, up until early this summer; I am no longer the manager of it. [5]

Q. Prior to this summer you had been for a period of about four years?

A. No. Longer than that.

Q. How long?

A. I would say about 1937.

Q. Now, as the manager of the Discount Department, what do your duties include, Mr. Royds?

A. Well—

Q. Just generally speaking.

(Deposition of Arthur V. Royds.)

Mr. Lasky: You mean, what did they include in 1948?

Mr. Erskine: Yes.

Q. (By Mr. Erskine): What did they include in 1948?

A. Well, I believe the manager is responsible for the operations of the department.

Q. And what does the—

Mr. Lasky: I move to strike the answer out as not responsive. He was not asked what he was responsible for. He was asked what his functions were, what he did.

Mr. Erskine: Let me ask you this:

Q. (By Mr. Erskine): As manager of the Discount Department, were you responsible for the operations of that department? A. Yes. [6]

Q. And what were your duties as such manager? What did you do in connection with the supervision of the operations of the department? I am referring, now, to 1948.

A. Well, I supervised the various functions within the department.

Q. What do those functions include?

A. Well, they included the handling of commercial loans of all types, the keeping and maintaining of collateral records, purchasing and selling of securities, and we also handled withheld taxes and minor operations.

Mr. Erskine: Now, I might state for the record that I am putting these questions for the same general purpose about which I was examining Mr. Messenger a few minutes ago.

(Deposition of Arthur V. Royds.)

I am about to put certain questions to the witness for the purpose of identifying checks paid to the Merchandise Bank on account of collateral assigned to the Merchandise Bank—that is, accounts receivable assigned to the Merchandise Bank as collateral by the United Produce Company to secure its loan. I say that for your information, Mr. Lasky.

I may be wrong about the method which can be used to identify those checks, but I have a method outlined here, and I would like to follow it to [7] see if what I believe to be the case is the case.

Q. (By Mr. Erskine): Now, Mr. Royds, when a check was brought into your department, the Discount Department, during the year 1948, to apply on accounts receivable assigned to the Merchandise Bank to secure the loan of the United Produce Company, that check was first of all delivered to a teller in your department, was it not?

A. That is right.

Q. Then that teller would enter the check on a register or a record as a credit to the account of the United Produce Company?

A. Not the check.

Q. Not the check, but an entry of the amount of the check, an entry of the credit based on the check?

A. The remittance sheets were used as the method entering them.

Q. The what sheets?

A. Remittance sheets.

(Deposition of Arthur V. Royds.)

Q. Were used as a method of entering them. What do you mean by that, exactly?

A. Well, the actual entering on the records was done through the medium of the remittance sheet which might include not only one check, but several checks. [8]

Q. When referring to a remittance sheet, do you refer to a paper like Defendant's Exhibit 41-A?

A. Yes.

Q. On the Messenger deposition, that is?

A. Yes.

Q. Now, you would take a remittance sheet similar to the sheet, Defendant's Exhibit 41-A on the Messenger deposition, and you would make an entry on the basis of that sheet, would you?

A. (No answer.)

Q. You have to answer so the reporter can hear you. A. Yes. I am sorry.

Q. And such an entry would be made in some book of original entry kept by the bank?

A. We have what is known as a subsidiary ledger on the receivable loans, in which that entry would be made.

Q. And such an entry would be made on that ledger? A. Yes.

Q. Then what would be done with that item? What would be the next step in the procedure dealing with that particular item?

A. Do you mean "checks" by "item"?

Q. Yes; checks.

A. Well, we have sort of reversed the procedure

(Deposition of Arthur V. Royds.)

here. [9] I mean, the first step would be to balance up the checks. They would be run on a sheet and balanced against the remittances.

Q. Against the remittance sheet?

A. The remittance sheets.

Q. Then what would be done with them?

A. The checks would then be sent up to the Proof Department, and the remittance sheet retained in the Discount Department as a posting medium.

Q. And what would be done in the Proof Department?

A. I have no knowledge of what they did with them in the Proof Department.

Mr. Lasky: I may say—off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Q. (By Mr. Erskine): Then the remittance sheet itself, you say, was kept in the department for posting purposes? A. That is correct.

Q. And to what would you post from the remittance sheets?

A. To the subsidiary ledger sheets.

Q. In the case of checks received on account of accounts receivable assigned to the bank by [10] the United Produce Company, the entries made on the subsidiary ledger sheet would show credits to the account of the United Produce Company for such payments, wouldn't they?

(Deposition of Arthur V. Royds.)

A. They were deposited in what we call the cash collateral account.

Q. That is a title in the subsidiary ledger sheet?

A. I believe it is headed up "Payments," and on our general ledger we carried an account, "Payments on assigned account loans."

Mr. Lasky: Those ledger sheets, of course, are all here, and they were brought in on Mr. Messenger's deposition.

Q. (By Mr. Erskine): Without trying to trace these steps, would you tell me, Mr. Royds, how the checks received by the bank on account of accounts receivable assigned to the bank by the United Produce Company, can be identified? That is, how can we tell whether such checks were checks drawn by a man by the name of Lofendo, or somebody else, from the records of this bank?

Mr. Lasky: How you can do it now?

Mr. Erskine: Yes.

Mr. Lasky: Is that it?

Mr. Erskine: Yes. [11]

A. There is no way that I know of that you can do it now.

Q. (By Mr. Erskine): Do those checks appear on any Recordat?

A. That is outside of my scope. That is handled in the Proof Department, and I am unable to answer.

Q. Who handles—what officer or employee of the bank in the Proof Department could respond to such questions?

(Deposition of Arthur V. Royds.)

Mr. Lasky: How does he know that?

Q. (By Mr. Erskine): If you know.

A. At the present time I do not know who is in charge of the Proof Department.

Mr. Erskine: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.)

Q. (By Mr. Erskine): Now, Mr. Royds, I will show you an exhibit that was introduced in evidence upon the taking of this deposition, Exhibit 29-PP on the taking of Mr. Messenger's deposition. You are familiar with such sheets, are you not?

A. Yes.

Q. They represent schedules of accounts receivable [12] assigned by the United Produce Company to the bank as collateral for its loan? A. Yes.

Q. Now, I will show you that this sheet is dated October 30, 1948; that is correct, is it not, still referring to this Exhibit 29-PP which was marked on Messenger's deposition?

A. Yes; that is correct.

Q. I will call your attention to the fact that that sheet lists as debtors of accounts receivable, which are listed on the sheet, Lofendo Distributing Company. A. Yes.

Q. Now, Mr. Royds, during this period of time, let's say from July 1st down through October, many such schedules of accounts receivable were delivered to the bank by the United Produce Company?

(Deposition of Arthur V. Royds.)

A. Yes.

Q. You examined such schedules when they were delivered to the bank, did you not?

A. I did not.

Mr. Erskine: Will you read the question to the witness, please, Mr. Reporter, to save repetition?

(The question of counsel was thereupon read by the Reporter as above recorded.) [13]

A. No. I did not examine the schedules in all cases.

Q. (By Mr. Erskine): Did you take a look at them occasionally? A. Yes.

Q. Now, referring to this Defendant's Exhibit 29-PP, did you notice on this schedule or any similar schedules filed with the bank during that period of time, July 1st, 1948, to November 17th, 1948, that the United Produce Company was including in its schedules the name of Lofendo Distributing Company as one of the debtors of its accounts receivable?

Mr. Lasky: You are asking him whether, during that period, he knows?

• Mr. Erskine: Yes.

The Witness: What was the period, please? July to when?

Mr. Erskine: July 1, 1948, to November 17th.

A. Yes.

Q. (By Mr. Erskine): You noticed, as a matter of fact, during that period, Mr. Royds, that that

(Deposition of Arthur V. Royds.)

name, Lofendo Distributing Company, appeared very frequently on such schedules?

A. Not very many.

Q. Well, I will call your attention to these [14] two sheets, the sheet marked Defendant's Exhibit 29-NN and Defendant's Exhibit 29-PP, and I will call your attention to the fact that the name Lofendo Distributing Company appears in the list of debtors on those two schedules many times relative to the number of debtors named in both of those sheets.

Mr. Lasky: Whether it does or does not is a deduction to be drawn from what appears there. The witness looks at the sheets and sees the sheets there.

Q. (By Mr. Erskine): Do you notice, upon looking at those sheets, the name Lofendo Distributing Company, Mr. Royds? A. Yes.

Q. And you noticed on similar sheets or similar schedules of accounts receivable assigned to the bank by the United Produce Company, the name appeared on the schedules sometimes frequently repeated on the same schedule?

Mr. Lasky: You are asking whether he notices it now, or he did during that period?

Mr. Erskine: During that period.

A. No, I didn't, during that period.

Q. (By Mr. Erskine): As I understand your testimony, you did notice [15] during that period that the name of Lofendo Distributing Company

(Deposition of Arthur V. Royds.)

appeared as one of the debtors of the accounts receivable?

A. My testimony refers directly to towards the end of the period. You are covering a large period there.

Q. Yes. Well, what do you mean by the end of the period, Mr. Royds?

A. The schedules which you exhibited to me, which are dated late in October, and those submitted in November, I believe, are the only ones you will find with a preponderance of Lofendo accounts on them.

Q. But when you saw those sheets late in October, did you notice the preponderance of Lofendo accounts at that time? A. Yes.

Q. Now, Mr. Royds, I show you an exhibit that has been marked No. 41-BB upon the taking of the deposition of Mr. Messenger, and I will ask you what that exhibit is, according to your understanding.

A. This is what I have referred to previously as a remittance sheet.

Q. That is a remittance sheet on a list of payments being made by the United Produce Company to the bank on account of the accounts receivable assigned to the bank as collateral? [16]

A. Yes.

Q. Now, I will call your attention, Mr. Royds, to the fact that this particular remittance sheet—let's call it a list of payments, if it is all right.

Mr. Lasky: Let's not call it a list of payments.

(Deposition of Arthur V. Royds.)

Mr. Erskine: All right.

Mr. Lasky: Let's call it what it is, a remittance sheet.

Mr. Erskine: You see, I am always amenable to the suggestions made by my colleague, Mr. Lasky.

Mr. Lasky: I object to designations which are inaccurate and which could only be designed to lead to inaccuracies in the record.

Mr. Erskine: It would not lead to such inaccuracies, as far as I am concerned, but I am perfectly willing to call them remittance sheets.

Q. (By Mr. Erskine): Referring to this remittance sheet, Defendant's Exhibit 41-BB, I will ask you if it is not a fact that the last four items on that remittance sheet refer to payments made by United Produce Company on account of the accounts receivable assigned by it to the bank as collateral, and that the items preceding those last four items refer to another matter.

A. May I hear the question again? [17]

Mr. Erskine: Yes. The Reporter will read the question.

(The question was thereupon read by the Reporter as above recorded.)

Mr. Lasky: Will you substitute "remittance" for "payment" in your question?

Mr. Erskine: Yes.

A. Mr. Lasky, I don't see how I could answer that question—

(Deposition of Arthur V. Royds.)

Mr. Erskine: Erskine.

The Witness: Or Erskine; excuse me. I do not see how I could answer that question without referring to the records. The way you worded it—

Mr. Erskine: Well—pardon me. Go ahead.

The Witness (Continuing): —you asked me if it is not a fact, and I certainly do not recall what happened in October, nor could I tell you without referring to the records. [18]

* * *

Q. During this period from July 1, 1948, to November 17th, 1948, did you have, in the course of the performance of your duties for the bank, any knowledge of the Commercial Account of the United Produce Company during that period—that is, whether or not that Commercial Account showed a black balance or a red balance on the debits or credits to it? Did you have any such knowledge during that time?

A. On occasion, yes.

Q. You say on occasion. On what occasions, Mr. Royds?

A. The bookkeeping department would, on occasion, contact me to see if a new loan had been granted that day, if a credit was coming through.

Q. Was it your department which handled the new loans which were made from time to time by the bank to the United Produce Company?

A. On accounts receivable.

Q. On accounts receivable? A. Yes.

Q. And at that time when such new loans were

(Deposition of Arthur V. Royds.)

made, the United Produce Company would execute notes to the bank [24] to evidence the loan, and they would then furnish the bank with a list of additional accounts receivable, would they not?

A. That is right.

Q. And, as I understand it, from time to time the bookkeeping department would inquire whether such loans had been made as a source of credits to the Commercial Account of the United Produce Company, is that right? A. Yes; that is true.

Q. Would the bookkeeping department at that time mention to you whether there was any overdraft in the Commercial Account?

A. That would be the reason for contacting me.

Q. Did they mention it to you on those occasions? A. Yes.

Q. Were those fairly frequent occasions during the period from July 1st to November 17th, 1948?

A. Not to my knowledge.

Q. Did you have any knowledge of the checks being debited to the account of the United Produce Company, in its Commercial Account, which were creating the overdrafts in that account, any overdrafts that may have existed in that account?

Mr. Lasky: Just a minute. That question assumes something. [25] It assumes there are overdrafts, unless you are referring to what we have been calling noon-day overdrafts.

Mr. Erskine: Yes; the noon-day red balances.

The Witness: Will you read the question, please?

(Deposition of Arthur V. Royds.)

(The question was thereupon read by the Reporter as above recorded.)

Mr. Erskine: That is, the noon-day red balances.

A. I had no knowledge concerning that.

Q. (By Mr. Erskine): Did you, Mr. Royds, have knowledge of the payments being received by the bank as shown in the remittance sheets similar to Exhibit 41-BB on the Messenger Deposition?

I think you have already testified to that, but I have another point in mind.

A. Your question is not quite clear, or else I do not understand it.

Mr. Lasky: I do not understand it either.

Mr. Erskine: What is that?

Mr. Lasky: I say, I agree with the witness in not having understood it.

Mr. Erskine: Then I am sure it was not clear.

The Witness: Would you—all right. If you would [26] read the question, maybe we could—

Mr. Erskine: That is all right. I will re-frame it.

Q. (By Mr. Erskine): This comes back to the same thing about which I asked you, but it is preliminary. The remittance sheets similar to Defendant's Exhibit No. 41-BB upon the taking of the deposition of Mr. Messenger, show remittances received by the Bank on account of the accounts receivable held by the bank as collateral, do they not? A. Yes.

(Deposition of Arthur V. Royds.)

Q. Now, when those remittance sheets were received, checks of the debtors specified in the remittance sheets, debtors making payments on account of accounts receivable, were received with the sheets, were they not? A. Yes.

Q. Now, during the period of July 1, 1948, to November 17th, 1948, did you notice that checks of Lofendo, payable to the order of United Produce Company, were among the remittances being received by the bank with the remittance sheets filed with the bank during that period?

A. I saw neither the checks nor the remittance sheets, Mr. Erskine. I think that answers your question.

Q. Who would see them, in your [27] department?

A. The bookkeeper and the teller that waited on them.

Q. Was it ever called to your attention, during that period from July 1st to November 17th, that many checks of Lofendo were being received as remittances at the time remittance sheets were filed with the bank?

A. No. It was never called to my attention.

Q. And during that period of time you never noticed that, is that right?

A. I did not see the sheets.

Q. And you did not have any discussion with any other officer or employee of the bank during that period with respect to the fact that many checks, aggregating large sums, were being received

(Deposition of Arthur V. Royds.)

as remittances accompanying remittance sheets, checks of a man by the name of Lofendo?

Mr. Lasky: That has been asked and answered just a minute ago.

A. No. I—

Mr. Erskine: This refers to discussion.

A. I did not have any such discussion.

Mr. Erskine: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not recorded by the Reporter.) [28]

Q. (By Mr. Erskine): Now, Mr. Royds, do you remember whether, during the period from July 1, 1948, down to November 17, 1948, any checks received by the Discount Department of the bank for application on account of accounts receivable assigned by the United Produce Company to the bank, were rejected upon the presentation of such checks to the banks upon which they were drawn?

A. Do I remember?

Q. Yes.

A. I was informed of that the day of the 17th.

Q. That was the first—

A. A few minutes before two o'clock I was shown the wire.

Q. Do you refer to this wire, a photostatic copy of which I am now showing to you, Defendant's Exhibit 9 for identification upon the taking of the deposition of Mr. Messenger?

(Deposition of Arthur V. Royds.)

A. I do not remember, nor do I think I could identify the particular wire, Mr. Erskine.

Q. Was that the first time that you heard of rejected checks that had been presented to the bank by the United Produce Company for application on account of accounts receivable assigned by that company to the bank as [29] collateral?

A. Yes.

Q. I will show you a wire here which has been marked Defendant's Exhibit No. 4 on the LeRoy Deposition, together with a translation of that wire which has been marked Exhibit No. 4-A, and I will ask you to take a look at those wires and tell me whether or not you ever saw the wire before?

A. No. I have no recollection of seeing this wire.

Q. Did you ever have any knowledge of the fact that the checks referred to in this wire, the check for \$25,000, and another for \$20,960, were presented to this bank by the United Produce Company for application on account of collateral assigned to the bank, accounts receivable assigned to the bank, and that these checks upon presentation to the bank upon which they were drawn were rejected?

A. No. I had no knowledge.

Q. Would not such a fact be called to your attention, as the manager of the department?

Mr. Lasky: Your question, of course, assumes that the checks were remitted to the Discount Cage and not placed in the Commercial Account.

(Deposition of Arthur V. Royds.)

Mr. Erskine: That is right, and that is our information. [30]

Q. (By Mr. Erskine): Passing for a moment to another subject, Mr. Royds, I will call your attention to a check here that has been marked Defendant's Exhibit 6, a check dated September 18, 1948, which I am quite positive is No. 6 on the LeRoy Deposition, a check signed by Jack Oddo, and I will ask you whether or not you have any recollection of that check.

A. What do you mean by "recollection," Mr. Erskine? You mean, recollection of ever seeing it?

Q. Yes.

A. No. I have no recollection of ever seeing it.

Q. Now, I will call your attention to the fact, Mr. Royds, that Defendant's Exhibit 4-R on the taking of the Messenger Deposition, a remittance sheet, refers to an accounts receivable of Jack's Fruit Company in the amount of \$22,140?

A. Yes.

Q. Does the fact that the remittance sheet just shown you contains that item, and that this check, Defendant's Exhibit 6 for identification, is made payable to the United Produce Company and bears the stamp of the teller of this bank, "Return September 28th, 1948"; does that bring home to your knowledge, Mr. Royds, that [31] the check was delivered to the bank as a remittance accompanying the remittance sheet just referred to?

A. Well, the similarity of dates and similarity of amounts would indicate that.

(Deposition of Arthur V. Royds.)

Q. Would indicate that—

Mr. Lasky: I move to strike that out because that is merely the witness' inference, which the rest of us can make, as well as the witness. You asked for the witness' knowledge.

Mr. Erskine: Yes.

Mr. Lasky: Does it, in fact, refresh his recollection whether he ever saw the check?

Q. (By Mr. Erskine): Or does it, in fact, refresh your recollection with respect to the fact that the check was received as a remittance with a remittance sheet, No. 40-R?

A. I have previously answered that I have no recollection of ever seeing the check. Is this the same question?

Q. Yes; it is substantially the same. You have no recollection of the item at all, is that right?

A. That is correct.

* * *

[Endorsed]: Filed April 14, 1950. [32]

[Title of District Court and Cause.]

DEPOSITION OF RAYMOND L. REDHEFFER

* * *

Direct Examination

By Mr. Erskine:

Q. Now, did you ever have any discussion with any officer or employee of your bank prior to November 17, 1948, in which—

(Deposition of Raymond L. Redheffer.)

A. Prior to what date?

Q. November 17, 1948—in which something along this line was stated, that it had been called to the attention of such officer or employee that the United Produce Company might be engaged in a kite? Was there anything [10*] of that sort ever said to you by an officer or employee of the bank—

A. Positively not.

Q. (Continuing): —prior to November 17th, 1948? A. Positively not. [11]

Q. Prior to that date, Mr. Redheffer, did any officer or employee of the bank say to you something along this line, that such officer or employee believed that the United Produce Company might be engaged in business transactions which were not bona fide, and which might be fictitious transactions?

Was any such statement ever made to you?

A. Never.

Q. Nothing along that line? A. Never.

* * *

[Endorsed]: Filed April 14, 1950. [12]

* Page numbering appearing at top of page of original
Reporter's Transcript.

[Title of District Court and Cause.]

DEPOSITION OF SAM GASSMAN

* * *

Mr. Erskine: Will you swear the witness, please,
Mr. Reporter.

Thereupon:

SAM GASSMAN

called as a witness on behalf of the defendant in the above-entitled cause, having been first duly sworn, was examined upon oral interrogatories and deposed and said as follows:

Direct Examination

By Mr. Erskine:

Q. What is your name?

A. Sam Gassman.

Q. You have already testified by way of deposition in this litigation? A. Yes, sir.

Mr. Erskine: Mr. Lasky, if you will permit, I will ask him a few leading questions, and then you tell me when you want me to stop.

Q. You testified, as I recall your testimony—

Mr. Lasky: As long as it is just identifying papers, go ahead and lead.

Mr. Erskine: Yes.

Mr. Lasky: But when you get beyond identification, do not. [3*]

Q. (By Mr. Erskine): The remittance sheets now being shown you, which are only part of the

* Page numbering appearing at top of page of original Transcript of Record.

(Deposition of Sam Gassman.)

remittance sheets previously identified, according to my recollection—the remittance sheets marked on the taking of the deposition of Mr. Messenger in this case as Defendant's Exhibits 38-A to 38-FF for identification, which I am now showing to you, are in your handwriting; is that correct?

A. All with the exception of this one, again.
(Indicating.)

Q. The exception to which you refer is Defendant's Exhibit 38-G for identification, on the Messenger Deposition; is that correct?

A. That is right.

Mr. Erskine: I see no reason, Mr. Lasky, why it is necessary to mark these documents again; do you?

Mr. Lasky: I do not see any necessity for it. They have been properly identified.

Mr. Erskine: They have been identified, yes.

Q. Now, what was your employment, Mr. Gassman, during the year 1948 up to about November 18th, 1948?

A. I was a bookkeeper for the United Produce Company.

Q. What were your duties as bookkeeper?

A. The general routine duties of a [4] bookkeeper.

Q. To keep the books and records of account of the company; is that correct? A. Yes, sir.

Q. Now, did the company have any other bookkeeper who kept its books and records, besides yourself? A. Nobody.

Q. I will show you a book here, Mr. Gassman,

(Deposition of Sam Gassman.)

that is labelled "No. 7—United Produce Company—Cash Receipts from July 1, 1948, to November 20, 1948," and I will ask you to examine that book, and let me know whether or not the entries made in that book are entries made in your handwriting.

Would you do that, please?

(The witness examined the book, turning the pages thereof.)

Mr. Lasky: Off the record.

(There occurred at this point an informal discussion, outside the record, which was not taken down by the Reporter.)

A. Looking at it roughly, I would say that they were in my handwriting, yes, sir.

Mr. Erskine: Now, I want to show you another book—or rather, first, the book that has just been referred to, Mr. Reporter, will you please mark as Defendant's [5] Exhibit No. 1, for identification.

(The book referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 1, (1-A to 1-AAA inclusive) for identification.)

Q. (By Mr. Erskine): Referring you then, to this book, the first page of which has been marked by the Reporter as Defendant's Exhibit 1-A for identification: Your testimony as I understand it is that these entries made in this book are in your handwriting?

A. Generally speaking, I would say so, yes, sir.

Q. Did you notice any, when you were examining the sheets, which are not in your handwriting?

(Deposition of Sam Gassman.)

A. I did not notice any.

Q. And you examined all of the sheets?

A. I believe so, yes, sir.

Q. Now I will show you another book here—or, first, this book that has been marked as Defendant's Exhibit 1, was a record of the United Produce Company, was it? A. Yes, sir.

Q. Kept by you? A. Yes, sir.

Mr. Erskine: Now I will show you another book, and I will ask the Reporter to mark this book as Defendant's [6] Exhibit 2 for identification, the first page being marked 2-A, and so forth.

(The book referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 2, (2-A to 2-YYYYYY inclusive) for identification.)

Q. (By Mr. Erskine): I will show you this book, which has just been marked as Defendant's Exhibit 2 for identification upon the taking of your deposition, and I will ask you what book that is.

A. It looks like the record of the Accounts Receivable.

Q. Of the United Produce Company?

A. Of the United Produce Company, yes, sir.

Q. Now, Mr. Gassman, I would like to have you run through that book, and tell me whether or not the entries made therein are in your handwriting.

(The witness examined the book, turning the sheets thereof.)

Mr. Erskine: Let the record show that the witness is now examining the sheets in the book which

(Deposition of Sam Gassman.)

is shown him, in the same manner in which he examined the sheets in the other book, Defendant's Exhibit 1 for identification.

A. Generally speaking, it is all in my handwriting, yes.

Q. When you use the term "generally speaking," you use [7] that term in the same sense that you did with respect to the other one, I take it?

A. Yes, sir.

Q. Now, Mr. Gassman, I will ask you whether or not you made the entries that are recorded in both of the books shown to you, Defendant's Exhibits 1 and 2 for identification, in the course of your duties as bookkeeper of the United Produce Company? A. Yes, sir, I did.

Q. And those entries were made on or about the dates which they bear, were they? A. Yes.

Q. Now, Mr. Gassman, I would like to call your attention to the remittance sheet which was marked upon the taking of the Messenger Deposition as Defendant's Exhibit 38-A for identification, and I would like to have you compare that—or rather, before I come to that: The remittance sheet, as I understand it, shows the payments made on account of Accounts Receivable on that date, July 1, to the Merchandise National Bank on account of a collateral loan; is that correct?

A. It would be on both collateral loan and on draft.

Q. Yes, as you testified the other day.

A. Yes. [8]

(Deposition of Sam Gassman.)

Q. The payments made on account of the collateral loan are the payments which are listed here, is that right—that is, La Mantia Brothers, \$506.16; Frank C. Lofendo, \$15,749; Sanzone-Palmisano Company, \$243.70; Gene Tufo & Company, \$2,008.44, and another payment for Gene Tufo & Company of \$1,239.76?

That is right, is it not? A. Yes.

Mr. Sokol: I wonder if I might be permitted to be off the record for a moment.

(There occurred at this point an informal discussion, outside the record, which was not taken down by the Reporter.)

Mr. Erskine: What was the last question and answer, please, Mr. Reporter.

(The record was thereupon read by the Reporter as above recorded.)

Q. (By Mr. Erskine): Now, Mr. Gassman, I would like to ask you to compare those items that I have just read off, as payments on account of Accounts Receivable, on items shown in this Cash Receipt Book as of July 1, 1948, as payments received by the United Produce Company on account of Accounts Receivable as of July 1, 1948—or rather, before I [9] come to that, I will ask you this:

Will you designate the payments, or rather, the entries made as of July 1, 1948, in the Cash Receipts Book, in order to record the payments received as of that date, on account of Accounts Receivable by the United Produce Company?

(Deposition of Sam Gassman.)

Would you mind reading those off for the record?

Mr. Sokol: If he can.

Mr. Lasky: What is the reason for his reading them off? That is something anybody can do. They are there.

Mr. Erskine: I just asked him to read those entries. However, in order to try to abbreviate it, then, I will ask you this leading question:

Q. Is it not a fact, Mr. Gassman, that the entries beginning with the name—what is that name?

A. S. Albertson.

Q. (Continuing): —S. Albertson & Sons, \$5,-475, down to and including the name Mazzie Farms, \$25,000, on the first page of the Cash Receipts Book, are the payments—or rather, are the entries made as of July 1 to record payments made on Accounts Receivable as of that date.

A. I would have to say, with the exception of Mazzie Farms.

Q. Oh, yes. [10]

A. With the exception of Mazzie Farms, and Merchandise National Bank.

Q. With those two exceptions— A. Yes.

Q. —the payments were payments made—or were entries made to record receipts on account of Accounts Receivable as of July 1, 1948?

A. That is right.

Q. Now, Mr. Gassman, those payments are few in number, and I would like to read them off to you:

S. Albertson & Sons; Barnett-Gurstein & Company; La Mantia Brothers; next, a ditto mark un-

(Deposition of Sam Gassman.)

der La Mantia; Sanzone-Palmisano Co.; Gene Tufo & Company; and next, a ditto mark under Gene Tufo?

Is that correct? A. Yes, sir.

Q. Now I would like to have you compare Defendant's Exhibit No. 38-A for identification, the remittance sheet bearing that Exhibit number, with the payments—or the entries that are shown in the Cash Receipts Book which I just read off to you, and tell me which of those entries appear in the Cash Receipts Book, but do not appear in the remittance sheet, Defendant's Exhibit No. 38-A for identification. [11]

Mr. Lasky: That of course is merely a matter of visual examination. The documents speak for themselves.

Mr. Erskine: It will only take a couple of seconds.

Mr. Lasky: Even then, it looks as though there will be no time left for appropriate cross-examination.

A. S. Albertson does not appear; Barnett-Gerstein does not appear; one, for La Mantia, for \$4,799, does not appear.

That is all.

Q. (By Mr. Erskine): For convenience, I will refer to those items that you have just read off as the omitted items, and you will understand that, will you, Mr. Gassman? A. Yes.

Q. And I will refer to the other items included in the list of Accounts Receivable which were read

(Deposition of Sam Gassman.)
off from the Cash Receipts Book, as the included items; and you will understand that.

A. Yes, sir.

Mr. Sokol: While you are looking at that book, counsel, I want to talk with Mr. Gassman outside for a moment; I want to ask him a question.

(Thereupon Mr. Sokol and the Witness Gassman conferred briefly outside the deposition room; after which the taking [12] of the deposition was resumed, as follows:)

Q. (By Mr. Erskine): Now, Mr. Gassman, I would like to ask you if there is a payment on the remittance sheet, Defendant's Exhibit 38-A for identification, on the taking of the Messenger Deposition, as of July 1, 1948, equal to the aggregate of the three omitted items which you specified?

A. Yes.

Q. What payment on the remittance sheet is such payment equal to the aggregate of the omitted items? A. \$15,749.

Q. Opposite which the name Frank C. Lofendo appears? A. That is right.

Q. And at the time you delivered this remittance sheet, Defendant's Exhibit 38-A for identification, to the bank, did you deliver to the bank a check of Frank C. Lofendo for that amount?

A. I can't remember whether that was in there or not, at this time, but I would assume it was.

Q. It was your practice, was it not, Mr. Gassman at that time, to deliver to the bank checks for the

(Deposition of Sam Gassman.)

Accounts Receivable being paid, referred to in the remittance sheet? [13]

A. I don't understand the question, sir.

Q. Was it or was it not your practice at the time you delivered a remittance sheet to the bank, in the form of this Defendant's Exhibit 38-A for identification, to accompany it by a check?

A. Yes, sir.

Q. (Continuing): —a check comparing, so far as the name of the maker and the amount were concerned, with each of the items of Accounts Receivable referred to on the sheet?

A. Yes, sir.

Mr. Lasky: Wait a moment. Do I understand that question and the answer correctly?

In the case of Defendant's Exhibit 38-A for identification, and similar documents, wherever there appears a name and an amount, a check in like amount, purporting to be made by the same person, accompanied the remittance sheet—is that my understanding?

Mr. Erskine: Not for each item appearing on the sheet, but for the Accounts Receivable items appearing on the sheet.

Mr. Lasky: Then I do not understand the question and the answer.

Mr. Erskine: Well, I do, and I will let them stand. [14]

Q. (By Mr. Erskine): Now, contemporaneous with the making of entries relating to Accounts Receivable in the Cash Receipts Book, were such

(Deposition of Sam Gassman.)

entries then posted to the other book, the book which you have described, I believe, as the Accounts Receivable Ledger?

A. Will you restate your question again, please, so that I might understand it?

Mr. Erskine: Would you read the question, please, Mr. Reporter.

(The question was thereupon read by the Reporter as above recorded.)

A. Yes, sir, they were.

Q. Now, I will ask you this question, Mr. Gassman: Will a comparison of the Cash Receipts Book, and the other remittance sheets, reference to which has been made upon the taking of this deposition, in your previous deposition, show whether or not similar incidents occurred on later dates following July 1, 1948, during the period from July 1 to and including November 17, 1948, that is, incidents relating to the Cash Receipts Book and remittance sheets, similar to that described by you occurring on July 1st?

Mr. Lasky: Now, I object to that question [15] on the ground that all the documents are here, and a comparison can be made by inspection of the documents; and the witness can neither add to nor subtract from what will there appear.

The best evidence happens to be before us, to wit, the documents themselves.

Mr. Erskine: What is your answer, Mr. Gassman? A. Probably, yes.

(Deposition of Sam Gassman.)

Q. (By Mr. Erskine): A comparison of the sheets with the books will show that?

A. I would say so.

Mr. Erskine: I will show you one other book here, Mr. Gassman, which I will ask the Reporter to mark as Defendant's Exhibit 3, for identification.

(The book referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 3, (3-A to 3-III) for identification.)

Q. (By Mr. Erskine): I show you this book, which has been marked by the Reporter as Defendant's Exhibit No. 3 for identification, and will ask you to tell me what that book is.

A. Looking at it roughly—the first few pages—it looks like the Cash Disbursements Book. [16]

Q. Of the United Produce Company?

A. Yes, sir.

Q. Would you examine that book further, for the purpose of telling me whether or not the entries made in that book are in your handwriting?

The Witness: Can I talk off the record? I was just going to say, I have to be back in my office at one o'clock.

Mr. Erskine: Well, I am very sorry, but it will only take a minute.

Mr. Sokol: I imagine that he would testify that he kept the book.

The Witness: Yes.

Mr. Sokol: Did you keep the book?

The Witness: Yes.

(Deposition of Sam Gassman.)

Mr. Sokol: If you kept the book, that should suffice. He does not have time to check each individual item.

The Witness: No.

Q. (By Mr. Erskine): You kept that book in the course of your duties as bookkeeper of the United Produce Company—Defendant's Exhibit No. 3 for identification? A. Yes, sir, I did.

Q. And the entries made in that book were made on or [17] about the dates they bear; is that correct?

A. Yes, sir.

Mr. Erskine: With that, I am through.

Mr. Sokol: I want to make certain that something appears here—and this should be part of the record.

Mr. Erskine: Yes.

Mr. Sokol: As you have previously testified, on a prior deposition, and on this deposition, you were a bookkeeper for the United Produce Company, although you were a bookkeeper, you had no care, custody or control of the United Produce people's ledgers, is that correct?

The Witness: Yes, sir.

Mr. Lasky: Let this record show that the witness has said he has got to be back in his office at one o'clock, and it is now five minutes to one. Now that means of course that there is no time left for proper cross-examination. I must have opportunity for proper cross-examination, or else this deposition will have to be quashed.

Mr. Sokol: Can you do this by affidavit? Can

(Deposition of Sam Gassman.)

Q. (By Mr. Erskine): A comparison of the sheets with the books will show that?

A. I would say so.

Mr. Erskine: I will show you one other book here, Mr. Gassman, which I will ask the Reporter to mark as Defendant's Exhibit 3, for identification.

(The book referred to was thereupon marked by the Reporter as Defendant's Exhibit No. 3, (3-A to 3-III) for identification.)

Q. (By Mr. Erskine): I show you this book, which has been marked by the Reporter as Defendant's Exhibit No. 3 for identification, and will ask you to tell me what that book is.

A. Looking at it roughly—the first few pages—it looks like the Cash Disbursements Book. [16]

Q. Of the United Produce Company?

A. Yes, sir.

Q. Would you examine that book further, for the purpose of telling me whether or not the entries made in that book are in your handwriting?

The Witness: Can I talk off the record? I was just going to say, I have to be back in my office at one o'clock.

Mr. Erskine: Well, I am very sorry, but it will only take a minute.

Mr. Sokol: I imagine that he would testify that he kept the book.

The Witness: Yes.

Mr. Sokol: Did you keep the book?

The Witness: Yes.

(Deposition of Sam Gassman.)

Mr. Sokol: If you kept the book, that should suffice. He does not have time to check each individual item.

The Witness: No.

Q. (By Mr. Erskine): You kept that book in the course of your duties as bookkeeper of the United Produce Company—Defendant's Exhibit No. 3 for identification? A. Yes, sir, I did.

Q. And the entries made in that book were made on or [17] about the dates they bear; is that correct?

A. Yes, sir.

Mr. Erskine: With that, I am through.

Mr. Sokol: I want to make certain that something appears here—and this should be part of the record.

Mr. Erskine: Yes.

Mr. Sokol: As you have previously testified, on a prior deposition, and on this deposition, you were a bookkeeper for the United Produce Company, although you were a bookkeeper, you had no care, custody or control of the United Produce people's ledgers, is that correct?

The Witness: Yes, sir.

Mr. Lasky: Let this record show that the witness has said he has got to be back in his office at one o'clock, and it is now five minutes to one. Now that means of course that there is no time left for proper cross-examination. I must have opportunity for proper cross-examination, or else this deposition will have to be quashed.

Mr. Sokol: Can you do this by affidavit? Can

(Deposition of Sam Gassman.)

you get together and stipulate certain facts, and have him sign and swear to it?

Mr. Lasky: I think so.

Mr. Erskine: I will stay here as long as necessary, to complete this deposition. I will make any necessary [18] arrangements, under which the deposition can be finished.

Mr. Moses: Can we come back tomorrow, for cross-examination at that time?

Mr. Sokol: I cannot do it tomorrow.

The Witness: Today is my birthday, and I would like to go home to my family, if I can.

Mr. Sokol: I cannot make it tonight, either. I have no interest in either side of this litigation, and no disposition to be rude to anybody——

The Witness: Pardon me, Mr. Sokol.

Mr. Sokol: Yes?

The Witness: If you can complete it in fifteen minutes—do you think you can?

Mr. Lasky: I will try.

Mr. Sokol: Why not go ahead and finish with him, and get it over with?

Mr. Lasky: I will try, because I have no disposition to hold things up.

Cross-Examination

By Mr. Lasky:

Q. I show you again, Mr. Gassman, the document marked as Defendant's Exhibit No. 38-A for identification on the Messenger Deposition, and similar

(Deposition of Sam Gassman.)

documents which you have seen and identified before as being in your [19] handwriting.

Now, you will notice that on each of these sheets appears in your handwriting a list of names; is that correct? A. Yes, sir.

Q. And opposite the names appear certain sums?

A. Yes.

Q. Representing money? A. Yes, sir.

Q. Now, when one of those sheets, such as Defendant's Exhibit 38-A for identification was delivered by you to the Merchandise National Bank, such sheet was accompanied by a check, or checks; is that correct? A. Yes, sir.

Q. Was there not, for each name listed on one of these sheets, a check purporting to be signed by the party whose name there appears?

A. Yes, sir, with the exception of these items up here (indicating) which were the payment of drafts.

Q. To clarify that, the items you refer to are those where the total is carried over—

A. Into drafts.

Q. (Continuing): —into the second column, called Drafts Discounted? [20] A. Yes.

Q. But with respect to items where the total is carried over in this other column—

A. Returned payable.

Q. Yes.

A. There were checks, as you stated before, yes, sir.

Q. In other words, opposite each name listed

(Deposition of Sam Gassman.)

there was a check of that party? A. Yes.

Q. In the amount stated opposite?

A. Yes, sir.

Q. And that was true in the case of each one of these sheets?

A. As I recall it, yes, sir.

Q. All right. Now, you have referred here to the Cash Receipts Book, which has been marked as Defendant's Exhibit 1-A for identification, the whole book—

Mr. Erskine: No; each page will have a letter designation, as part of Defendant's Exhibit 1.

Mr. Sokol: As I understand it, you are marking the books as Defendant's Exhibits 1, 2 and 3 for identification, and the pages will bear the designation 1-A, 2-A, 3-A, and so on.

Mr. Lasky: The page to which you referred, Mr. Erskine, [21] in your questioning, would be page 1-B?

Mr. Erskine: No, that would be 1-A, according to what has just been stated. If we mark the book Exhibit 1, with the letter designations on each page, then the page to which I was referring would be 1-A.

Mr. Lasky: All right, just as long as we understand that, we can proceed on that basis.

Q. (By Mr. Lasky): Referring to page 1-A of Defendant's Exhibit 1 for identification, certain names and amounts which here appear, also appear in the same way, that is, the same names and the

(Deposition of Sam Gassman.)

same amounts, upon one of the daily remittance sheets.

Now, you referred to Defendant's Exhibit 38-A for identification—

A. Well, not the same names that appear here (indicating) appear here (indicating), no, sir.

Q. But certain of them do?

A. Certain of them do, yes.

Q. You have pointed out that some of the names that appear on the daily remittance sheet, do not appear on Defendant's Exhibit 1-A?

A. Some of them that appear here (indicating)—

Q. Yes, do not appear on the Defendant's Exhibit 1-A? A. Yes. [22]

Q. But you have testified that, totalling certain items which appear under certain names on Defendant's Exhibit 1-A for identification, the same total appears on Defendant's Exhibit 38-A for identification, under a different name?

A. That is right.

Q. Well, now, let me ask you this question: With respect to those items which appear on Defendant's Exhibit 38-A for identification, but not on Defendant's Exhibit No. 1-A on your deposition, were there any—or, rather, I had better reframe that question.

Take those names and amounts which appear upon Defendant's Exhibit 1-A for identification, on your deposition, which do not appear on Defend-

(Deposition of Sam Gassman.)

ant's Exhibit 38-A for identification on Mr. Messenger's Deposition—

Mr. Sokol: Pardon me. Off the record.

(At this point there occurred an informal discussion, outside the record, which was not taken down by the Reporter.)

Q. (By Mr. Lasky): I will ask you this question, Mr. Gassman: With respect to those entries you just referred to, where in fact no such amounts were received from the persons named, upon whose instructions were entries of that [23] character and type made? A. Mr. Rosenthal's.

Q. The secretary-treasurer of United Produce Company? A. That is right.

Q. Now, referring to the daily remittance sheets of which Defendant's Exhibit 38-A of Mr. Messenger's Deposition is the form: Referring to items under the name Frank C. Lofendo, where in the books of the United Produce Company were those receipts from Frank C. Lofendo, or from the name of Frank C. Lofendo, recorded, under what account?

A. Those from Frank C. Lofendo?

Q. Yes. A. Under any account.

Q. Under any account?

A. It could have been under any of the accounts, in the Accounts Receivable.

Q. Was there anything whatever in the books of the United Produce Company which would record the receipt from Frank C. Lofendo of such sums?

(Deposition of Sam Gassman.)

A. Pardon me, but I don't understand your question, Mr. Lasky.

Mr. Lasky: Well, I will try to clarify it.

Q. Take for example Defendant's Exhibit No. 38-A for [24] identification, where there is an item listed for Frank C. Lofendo of \$15,749.

A. All right.

Q. That item does not appear in the Cash Receipts on the page marked on your Deposition as Defendant's Exhibit 1-A for identification, does it?

A. No.

Q. But is there anywhere in the books of United Produce Company, where there is a record of a receipt by the United Produce Company from Frank C. Lofendo of a check for \$15,749?

A. No, there is not—that is, not in the actual books, no, sir.

Of course, the question there is, what you refer to as "books."

Can I go off the record a minute?

Mr. Lasky: Yes.

(There followed an informal discussion, outside the record, which was not taken down by the Reporter.)

Q. (By Mr. Lasky): Is there any account, or was there any account kept in any of the books of the United Produce Company under the name of Pre-Season Advances, or any similar name? [25]

A. Yes, sir, there were.

(Deposition of Sam Gassman.)

Q. Is that in any of the books that you have here before you on this deposition?

A. No, none of these.

Q. What book would it be in?

A. Wait a minute. Let me see. It might be in this one—no, I don't think it is in this one, either. There was another book, either of this size or a smaller size, that showed Pre-Season Advances.

Q. I see. Now, let me ask you this question, as to whether or not checks received by the United Produce Company over the signature of Frank C. Lofendo, were somehow, and in some way, recorded in that account or a related account—I mean, the Pre-Season Advances account?

Mr. Erskine: That is, checks referred to in the remittance sheets?

Mr. Lasky: Yes.

A. Those referred to in the remittance sheets?

Q. (By Mr. Lasky): Yes.

A. I don't remember, Mr. Lasky; I really don't remember.

Q. What other books, if any, did United Produce Company keep besides those which have been marked for identification [26] here?

A. General Ledger, a Pre-Season Journal, and then there were the Accounts Payable bookkeeping cards.

Q. Do you know where those books are now?

A. I don't have the slightest idea.

Q. Now, what kind of shipping documents were used by the United Produce Company in the shipping and handling of produce handled by it?

(Deposition of Sam Gassman.)

A. Well, that was outside the scope of my duties; I mean, that was in the scope of the Traffic Man's duties.

Q. You were not acquainted with whether or not they used—or rather, with what kind of bills of lading they used?

A. I am not familiar with that to any extent, really, no, sir.

Mr. Lasky: Well, all right. I think, then, I will discontinue my examination at this time.

Mr. Erskine: Just a moment, please.

Mr. Sokol: Is that all, gentlemen?

Mr. Erskine: Just one moment further, please. Yes, that is all.

And Further the witness deposed and said not.

Mr. Sokol: All right, Sam; you may go.

(Witness excused.) [27]

/s/ SAM GASSMAN.

Subscribed and again sworn to before me this 29th day of December A.D. 1949.

[Seal] /s/ CLAUDE W. YOUNKER, SR.,
Notary Public, State of
Illinois.

My Commission expires September 20, A.D. 1950.

[Received in evidence as Defendant's Exhibit W.]

[Endorsed]: Filed May 24, 1950. [28]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true copies thereof, in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellants:

Complaint.

Order requiring persons to be joined as party defendants.

Answer and Counterclaim and Interpleader by Counterclaim.

Answer of Frank C. Lofendo to Defendant's Counterclaim.

Plaintiff's reply to Defendant's Counterclaims.

Answer of Eugene J. O'Riley, as Trustee, to Plaintiff's Complaint and Reply to Defendant's Interpleader Counterclaim.

Answer of Cy Mouradick to Plaintiff's Complaint and to Defendant's Interpleader Counterclaim.

Amended Answer and Counterclaim.

Amended Complaint.

Affidavit of Morse Erskine in opposition to motion allowing the filing of amended complaint, filed June 29, 1950.

Stipulation concerning testimony of Dean Howell.
Affidavit of John R. McDonough, filed July 19,
1950.

Affidavit of Moses Lasky, filed July 19, 1950.

Affidavit of Morse Erskine, filed September 7,
1950.

Affidavit of L. J. Tobey, filed September 7, 1950.

Affidavit in support of offer of proof, filed Sep-
tember 7, 1950.

Stipulation of facts.

Order for judgment in favor of plaintiff.

Order denying motion to strike the amended com-
plaint.

Findings of fact and conclusions of law.

Judgment.

Defendant's proposed findings of fact and con-
clusions of law.

Stipulation that execution of judgment shall be
stayed.

Cost bill.

Defendant's objections to items of costs.

Notice of motion by Plaintiff to review taxation
of costs.

Notice of motion by Defendant to review taxation
of costs.

Order overruling objections to taxation of costs.

Defendant's notice of appeal.

Interpleaded Defendant's, Eugene J. O'Riley,
notice of appeal.

Defendant's designation of record on appeal.

Stipulation on appeal.

Plaintiff's Exhibits: 1, 2, 3-A for Ident., 3-B for Ident., 4 for Ident., 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34.

Defendant's Exhibits: B, C, C-1, D, E, F, G, H, I for Ident., J, K for Ident., L, M for Ident., N for Ident., O, P for Ident., Q, R, S for Ident., T for Ident., U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ, RR, SS, TT, UU, VV, WW, XX, YY.

Reporter's Transcript, June 15, 1950.

Reporter's Transcript, June 16, 1950.

Reporter's Transcript, June 19, 1950.

Reporter's Transcript, June 20, 1950.

Reporter's Transcript, June 21, 1950.

Reporter's Transcript, June 22, 1950.

Reporter's Transcript, June 23, 1950.

Reporter's Transcript, June 26, 1950.

Reporter's Transcript, June 29, 1950, (two volumes).

Deposition of Arthur V. Royds.

Deposition of Louis D. Rosenthal.

Deposition of Anthony L. Koefoot.

Deposition of William Edward Tague.

Deposition of Henry J. Reichwein.

Deposition of Frederick C. Messenger (Vol. 1).

Deposition of Frederick C. Messenger (Vol. 2).

Deposition of William F. Collins.

Deposition of Raymond L. Redheffer.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 31st day of July, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13039. United States Court of Appeals for the Ninth Circuit. Bank of America National Trust and Savings Association, a National Banking Association, and Eugene J. O'Riley, as Trustee in Bankruptcy of the Estate of United Produce Company, a Corporation, Bankrupt, Appellants, vs. Merchandise National Bank of Chicago, a National Banking Association, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed July 31, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13039

**MERCHANDISE NATIONAL BANK OF CHI-
CAGO, a National Banking Association,**

Plaintiff and Respondent,

vs.

**BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a National Bank-
ing Association,**

Defendant and Appellant.

**STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL**

The points upon which appellant, hereinafter referred to as defendant, intends to rely upon this appeal are these:

**I. Points With Respect to the Payment of the
Checks.**

1. The evidence shows without conflict that appellee, hereinafter referred to as plaintiff, paid the four checks aggregating \$89,831.00 and the six checks aggregating \$113,216.50; and the findings of the trial court that the four checks and the six checks were not paid or collected is clearly erroneous.

In this connection defendant relies on the following subordinate propositions:

(a) If it be assumed that when plaintiff debited the four checks and the six checks against the commercial account of United Produce Company, hereinafter referred to as United, with plaintiff, there was not a good balance to the credit of United in the account, but an overdraft, nevertheless the acts of plaintiff with respect to the four checks and six checks (including the debiting of them against United's account, the perforating them with a mark to the effect that they were paid, the crediting of defendant on the books of plaintiff with their amounts, and the sending to defendant of the so-called advices of credit to the effect that they were paid) constituted payment of the checks.

(b) The findings of the trial court that when on November 12, 1948,¹ the plaintiff debited the four checks against the account of United with it and when on November 15th, it debited the six checks against this account there was an apparent credit balance therein, but in fact there was no such balance, but an overdraft of over \$500,000.00, is not supported by the evidence and is clearly erroneous. The evidence shows without conflict (i) that when the four checks and the six checks were debited against the account, there was a good balance therein to the credit of United and (ii) that when plaintiff made these debits it was not laboring under

¹As all the events in this case took place in 1948, we hereafter in stating dates in this instrument will only refer to the month and day and not the year; it will be understood that the year of each date will always be 1948.

a mistake that there was a good balance in the account when in fact there was an overdraft in it.

(c) The evidence shows without conflict that United delivered to plaintiff checks, hereinafter referred to as Lofendo checks, signed by Frank C. Lofendo, hereinafter referred to as Lofendo, and payable to United as remittances on account of accounts receivable assigned by United to plaintiff to secure loans made by plaintiff to United. The trial court's findings, that under the agreement between plaintiff and United the Lofendo checks delivered by United to plaintiff as remittances on account of assigned accounts receivable constituted conditional credits in the amounts of such checks subject to charge-back at any time before actual collection of the funds, is clearly erroneous. The evidence shows without conflict that plaintiff accepted all checks delivered to it by United as remittances on account of assigned accounts receivable as payments on account of loans made by it to United; and that when such checks were not paid upon presentation the effect was to restore the indebtedness of United to plaintiff to the amount at which it would have been if the checks had not been accepted as payments. When such checks were not paid, plaintiff under the general law had a right to offset its indebtedness to United evidenced by United's credit balance in its commercial account with plaintiff against United's indebtedness to it; but this right of plaintiff did not arise under any agreement between United and plaintiff evidenced by writings. And the fact that plaintiff had this right did not

reduce the balance to the credit of United with plaintiff until plaintiff actually exercised its right of set-off. The evidence shows without conflict that plaintiff did not exercise this right until after both the four checks and the six checks had been paid.

(d) The findings of the trial court, that United presented the four and six checks to the East Bakersfield Branch of defendant, which branch will be referred to hereafter as the branch, is not a correct statement of the fact. It is true that in the month of November and for about two months prior to November, United was using the account established by Lofendo at the branch, which account will be referred to herein as the Lofendo account, for its own purposes and that Lofendo did not have any interest in the checks drawn on this account or in the checks credited thereto; but it is also true that Lofendo established the account and that all checks deposited therein were deposited in his name and purported to be deposits of his and that the branch believed that he was presenting the checks to it for deposit to the account.

II. Points With Respect to Question Whether Defendant Was a Purchaser for Value of the Four Checks and Their Proceeds.

The trial court found that on November 17th, there was a telephone conversation between plaintiff and defendant in which plaintiff gave defendant notice that United had defrauded plaintiff; that at the time defendant received this notice it had not acted in any way on the advices of credit with

respect to the four checks; that defendant did not at any time either before or after this telephone conversation change its position in any way to its detriment in reliance upon these advices of credit; that defendant did not act on the advices of credit until November 18th, when defendant posted the credit to the Lofendo account; and that defendant never became a bona fide purchaser for value of the four checks or their proceeds. These findings will be referred to hereafter as the findings of the trial court that defendant did not become a purchaser for value of the four checks.

And as a conclusion of law the trial court found that after November 17th, defendant had no authority or right to pay to Lofendo or itself in discharge of any obligation of Lofendo to it the sum represented by the four checks.

1. Under the law plaintiff cannot recover its payment of the four checks and the six checks even if it be assumed for argument's sake that defendant did not act on the advices of credit with respect to the four checks or with respect to the six checks and that its position was not changed in any way to its detriment because plaintiff had paid these checks and had sent defendant the advices of credit. The law is that when one bank pays checks to another bank in the course of the banking business, the paying bank cannot recover such payment on the ground that it was induced by its own mistake or by the fraud of some third person to make the same. This is the law because any other rule would

create intolerable delay, uncertainty and confusion in the vast commercial transactions carried on by means of checks.

2. The branch sent the four checks to plaintiff for collection with a collection letter directing plaintiff to credit the proceeds to defendant with advice to the branch. When on November 12th, plaintiff paid the four checks and when it, pursuant to the directions of the collection letter, credited defendant on its books with the amount of the four checks and sent the branch advices of credit to the effect that the checks had been paid, the agency of defendant for Lofendo to collect the four checks terminated and plaintiff on November 12th, became indebted to defendant for the amount of the four checks and defendant at the same time became indebted to Lofendo in such amount. When on November 12th, defendant thus became a creditor of plaintiff and a debtor of Lofendo in the amount of the four checks, its position was changed and on that date it became a bona fide purchaser of the four checks and their proceeds and so plaintiff cannot recover from defendant its payment of them.

3. If it be assumed for argument's sake that on November 12th, defendant did not cease to be the agent of Lofendo for the collection of the four checks and that on that date defendant did not become a creditor of plaintiff and a debtor of Lofendo in the amount of the four checks, nevertheless at the very latest when on November 16th the advices of credit for the four checks were received

at the branch, defendant's agency for their collection was terminated and defendant on that day became the creditor of plaintiff and the debtor of Lofendo in such amount; and so at the very latest, on November 16th, before plaintiff had given defendant any notice that United had defrauded it, defendant's position was changed with respect to the four checks and on that date defendant became a bona fide purchaser of them and their proceeds, and so plaintiff cannot recover their payment from defendant.

4. The trial court's conclusion of law that defendant did not become a debtor of Lofendo in the amount of the four checks is not supported by any evidence and is contrary to the law and is clearly erroneous.

5. As stated, when on November 16th the advices of credit for the four checks were received at the branch, it at the very latest became indebted to Lofendo in the amount of the four checks. The evidence shows without dispute that at the close of business on November 16th, Lofendo was indebted to the branch in the sum of \$172,094.84. As of the close of business on that date these cross demands compensated one another regardless of when the bookkeeping entries evidencing the offset were made. And therefore at the close of business on November 16th, before defendant had been advised by the telephone conversation of November 17th that United had defrauded plaintiff, defendant had become a bona fide purchaser for value of the four

checks and their proceeds and consequently plaintiff cannot recover their payment from defendant.

6. The evidence shows without dispute that the amount of the four checks was credited to the Lofendo account on November 17th, and that, pursuant to the banking practice of delayed posting, this credit was posted on November 18th as of November 17th. If it be assumed for argument's sake that said cross demands did not compensate one another until defendant took some action to credit Lofendo with the amount of the four checks, nevertheless defendant on November 17th before the telephone conversation on that date did give Lofendo credit for the four checks and therefore at the very latest it changed its position on that date and became a bona fide purchaser of the four checks and their proceeds.

7. As stated, at the close of business on November 16th, Lofendo was indebted to the branch in the sum of \$172,094.84 and as also stated at the close of business on that date, the branch had in its hands the advices of credit for the four checks. Under the law defendant had a lien upon the four checks and upon their proceeds and upon the advices of credit for the four checks to secure Lofendo's indebtedness to it, and therefore defendant was in the position of a holder for value of the four checks and the advices of credit with respect to them and their proceeds and so plaintiff cannot recover its payment of the four checks from defendant.

8. The evidence shows without conflict the facts stated in the following subparagraphs (a) to and including (d) of this paragraph 8:

(a) On November 16th the branch received in the mail for deposit to the Lofendo account checks drawn by United payable to Lofendo aggregating \$97,207.00; and on that day it gave Lofendo credit for the amount of these checks (which credit was conditional, that is it was subject to the condition that the checks would be paid on presentation) and sent them to its correspondent in Chicago so that its correspondent could present them through the clearing house to plaintiff for payment. On November 15th checks aggregating \$75,586.86 drawn by Lofendo payable to United arrived at the branch and on November 16th checks aggregating \$109,-569.15 drawn by Lofendo and payable to United arrived at the branch. At the close of business on November 16th there was to the credit of Lofendo in his account with the branch \$13,061.17 of collected funds plus the credit of \$97,207.00. At the close of business on November 16th the branch charged the checks for \$109,569.15 against the amount to the credit of Lofendo in the account. The advice of credit for the four checks for \$89,-813.10 arrived at the branch on November 16th after this charge of \$109,569.15 had been made against the account. As already stated, the four checks were credited to the account on November 17th, but pursuant to the practice of delayed posting, this credit was posted to the account on November 18th as of November 17th. Concurrently

with the entry on the books of the credit for the four checks of \$89,813.10, the checks for \$75,586.86 were charged against it. On November 18th, after the close of business, the branch received word from its Chicago correspondent that plaintiff had refused payment of the checks for \$97,207.00.

(b) Although the collection letter which accompanied the six checks when they were forwarded by the branch to the plaintiff for payment had requested that this advice be sent to the branch, plaintiff sent it to the head office of the defendant in San Francisco where it was received on November 18th. As the head office of defendant had no function to perform with respect to this advice of credit other than to treat it as a misrouted item, it sent it to the branch where it was received on November 19th. On that date the branch credited the Lofendo account with the amount of the six checks and on the same day charged the account with the checks for \$97,207.00.

(c) The checks for \$109,569.15 were payable to United and were Lofendo checks delivered to plaintiff by United as remittances and were applied by plaintiff on account of United's indebtedness to it; and therefore when the branch paid these checks United's indebtedness to plaintiff was reduced by the amount of them and so plaintiff got the benefit of such payment.

(d) The checks for \$75,586.86 included checks for \$51,862.36 which were payable to United and were Lofendo checks delivered to plaintiff by United as remittances and were applied by plaintiff on

account of United's indebtedness to plaintiff; and therefore when the branch paid these checks United's indebtedness to plaintiff was reduced by the payment of them and so plaintiff got the benefit of such payment.

As stated, the checks for \$75,586.86 were charged by the branch against a credit balance made up principally of the credit created by plaintiff's payment of the four checks. And so if plaintiff is permitted to recover its payment of the four checks it will, in effect, be paid twice; it will have received the benefit of the payment of the \$51,862.63 charged against a credit balance made up principally of the amount of the four checks and at the same time it will have recovered this latter amount. Under the law this inequitable result precludes plaintiff in any event from recovering from defendant the payment of the four checks.

9. Said finding of the trial court that defendant did not become a purchaser for value of the four checks, and said conclusion of law that after November 17th defendant had no authority or right to pay itself in discharge of any obligation of Lofendo to it in the sum represented by the four checks, are not supported by any evidence and are clearly erroneous.

III. Points With Respect to Question Whether Defendant Was a Purchaser for Value of the Six Checks and Their Proceeds.

The trial court found that at no time did defendant in any way take any action whatsoever in re-

liance on the advice of credit relative to the six checks or in reliance on the supposed collection or payment of the six checks, and that defendant in no way at any time changed its position or suffered any prejudice in reliance on the supposition that the six checks or any of them had been paid, and that at no time did defendant give anything of value to anyone for the six checks. This finding will be referred to hereafter as the finding of the trial court that defendant did not become a purchaser for value of the six checks.

1. As indicated, defendant makes the same point with respect to the six checks as that made with respect to the four checks in paragraph 1 of section II of this paper.

2. The branch sent the six checks to plaintiff for collection with a collection letter requesting plaintiff to credit the proceeds to defendant with advice to the branch. When on November 15th plaintiff paid the six checks and when it, pursuant to the direction of the collection letter, credited defendant on its books with the amount of the six checks and sent defendant an advice of credit to the effect that the checks had been paid, the agency of defendant for Lofendo to collect the six checks terminated and plaintiff on November 15th became indebted to defendant in the amount of the six checks, and defendant at the same time became indebted to Lofendo in the same amount. When on November 15th defendant thus became a creditor of plaintiff and a debtor of Lofendo in the amount

of the six checks, its position was changed and on that date it became a bona fide purchaser of the six checks and their proceeds, and so plaintiff cannot recover from defendant its payment of them.

3. If it be assumed for argument's sake that on November 15th defendant did not cease to be the agent of Lofendo for the collection of the six checks, and that on that date defendant did not become a creditor of plaintiff and a debtor of Lofendo in the amount of the six checks, nevertheless at the very latest when the advice of credit for the six checks was received by defendant, defendant's agency for the collection of the checks was then terminated and defendant on that date became the creditor of plaintiff and the debtor of Lofendo and therefore its position was changed. The fact that such change in position occurred after the telephone conversation of November 17th in which plaintiff told defendant that United had defrauded it can make no difference; such change of position on defendant's part was inevitable when on November 15th plaintiff paid the six checks and mailed defendant the advice of credit with respect to them; after that date defendant could do nothing to prevent such change in its position from taking place; and so in any event defendant became a purchaser for value of the six checks and plaintiff cannot recover from defendant its payment of them.

4. As stated, the evidence shows without dispute that at the close of business on November 16th, Lofendo was indebted to the branch in the sum of

\$172,094.84; that the branch credited the account with the amount of the four checks on November 17th and posted this credit on November 18th as of November 17th; and that concurrently the branch charged the account with the checks for \$75,586.86. The evidence also shows without conflict that when this was done, the indebtedness to Lofendo as of the close of business on November 17th was reduced to \$82,281.74; that this indebtedness arose out of the fact that on November 15th the branch had given Lofendo the conditional credit for the checks for \$97,207.00, which credit the branch had the right to recover from Lofendo at any time prior to the payment of these checks; that on November 18th the branch was notified by its Chicago correspondent that plaintiff had refused payment of the checks for \$97,207.00; and that therefore at the close of business on November 18th, Lofendo's indebtedness to defendant for \$82,281.74 became unconditional. Under the law, defendant had a lien upon the six checks and upon their proceeds and upon the advice of credit for the six checks to secure Lofendo's indebtedness to it. And therefore defendant was in the position of a holder for value of the six checks and their proceeds and so plaintiff cannot recover its payment of the six checks from defendant.

5. As stated, the evidence shows without conflict that the checks for \$109,569.15 were payable to United and were Lofendo's checks delivered to plaintiff by United as remittances and were applied by plaintiff on account of United's indebtedness to

it; that when the branch paid these checks United's indebtedness to plaintiff was reduced by their amount; and that therefore plaintiff got the benefit of such payment. And as also stated, the evidence shows without conflict that after plaintiff got the benefit of defendant's payment of the checks for \$109,569.15, it refused to pay the checks for \$97,-207.00, the crediting of which to Lofendo's account created the credit balance against which the checks for \$109,569.15 were charged; and that upon plaintiff's rejection of the checks for \$97,207.00, these checks were charged against the balance in the account created by the crediting thereto of the six checks for \$113,206.50. If plaintiff is permitted to have the \$109,569.15 charged against the \$97,207.00 and at the same time to recover the \$113,216.50 against which the \$97,207.00 was charged, it will be getting the benefit of the \$97,207.00 paid out by defendant and at the same time will be denying defendant the benefit of its payment of the six checks. Under the law this inequitable result precludes plaintiff in any event from recovering from defendant the payment of the six checks.

6. Said findings of the trial court that defendant did not become a purchaser for value of the six checks are not supported by any evidence and are clearly erroneous.

IV. Points With Respect to the Trial Court's Findings Concerning Plaintiff's Account With Defendant.

The trial court found that through 1948, plaintiff

had a deposit account with defendant with a large credit balance in plaintiff's favor; that during the existence of that account defendant from time to time sent to plaintiff for collection checks drawn upon plaintiff; that in such cases defendant was authorized by plaintiff to charge plaintiff's said account with the amount of the checks, and would so charge the account only upon actual receipt from the plaintiff of a written authorization to do so, in the form of an outstanding and unrevoked credit memorandum or advice of credit; that this was the uniform custom, practice and arrangement between plaintiff and defendant and was observed by defendant at all times until November 19, 1948; that on November 19th defendant charged plaintiff's deposit account with the six checks and that said charge was made without authority from plaintiff and without legal right and was insufficient to reduce defendant's indebtedness to plaintiff in any amount.

The trial court's findings (i) that defendant would only charge plaintiff's account with it upon actual receipt from plaintiff of a written authorization to do so in the form of an outstanding credit memorandum and advice of credit, and (ii) that this was the uniform custom, practice and arrangement between plaintiff and defendant and was observed by defendant at all times until November 19, 1948; and (iii) that the charge by defendant on November 19th of plaintiff's account with it with the amount of the six checks was without authority from plaintiff and without legal right and was

insufficient to reduce defendant's indebtedness to plaintiff in any amount, are all without any evidence to support them and are clearly erroneous. But in any case these findings are irrelevant. The crucial issues in this case are whether plaintiff paid the four checks and the six checks and whether it under the law has the right to recover such payments upon the ground that it was induced to make same by mistake or fraud. If plaintiff made the payments and is not entitled under the law to recover them, it cannot prevail in this action regardless of the charges made by defendant against plaintiff's account.

V. Points With Respect to the Alleged Agreement That Plaintiff's Payment of the Six Checks Should Be Rescinded.

The trial court found that on November 17th plaintiff had a telephone conversation with defendant in which plaintiff informed defendant that the advice of credit for the six checks was rescinded and revoked and in which defendant agreed with plaintiff not to act upon the advice of credit if and when it should be received by defendant and agreed to return it to an emissary of plaintiff; and the trial court also found that on November 18th defendant agreed that it would not act upon the advice of credit for the six checks when received and that it would return this advice to plaintiff and that plaintiff would return the six checks to defendant.

These findings of the trial court are based upon the telephone conversation of November 17th between Frederick C. Messenger, an officer of plain-

tiff, and F. E. Etribou, the manager of the branch; and on conversations between Allen R. LeRoy, another officer of plaintiff, and officers of defendant which took place in San Francisco on November 18th and on a letter delivered by LeRoy to defendant on that date.

1. Plaintiff contends in substance that the effect of the alleged agreement was that when defendant agreed, as alleged, that it would not act upon the advice of credit and would return it, defendant was in effect agreeing to a rescission of the payment of the six checks by plaintiff and that defendant would surrender rights already vested in it by repaying to plaintiff the amount of the six checks. Said evidence upon which said findings with respect to the alleged agreement is based shows that there was no intent to effect by agreement the legal relations between the parties. Said evidence shows that plaintiff was not recognizing any rights on defendant's part and was not asking defendant to enter into an agreement surrendering such rights; but said evidence shows at most that plaintiff simply gave defendant a direction that the advice of credit was being rescinded because sent out in error and that defendant acquiesced in such direction, and that the parties did not intend to make and did not make an agreement altering their legal relations. Therefore the findings that the alleged agreement was made are not supported by any evidence and are clearly erroneous.

2. But if it be assumed for argument's sake that

the alleged agreement was made, then it was invalid and unenforceable for the following reasons:

(a) The alleged agreement was not supported by any consideration.

(b) The alleged agreement was based on a mutual mistake respecting the existence of a basic fact, namely, that there was a good balance to the credit of Lofendo in the branch and that therefore defendant would not take any loss by agreeing to the rescission of the payment.

(c) The alleged agreement was induced by plaintiff's misrepresentations that the advice of credit had been sent out in error, whereas the evidence shows without dispute that plaintiff did not send out the advice of credit in error, but that it, as part of the regular routine of its banking business, sent out the advice of credit, at the same time charging the six checks against a good balance to the credit of United in United's commercial account.

(d) The evidence shows without dispute that plaintiff by its misrepresentations induced defendant to pay checks drawn on the Lofendo account to the order of United and induced defendant to give Lofendo credit for the checks drawn by United payable to Lofendo and deposited in the branch. This conduct on plaintiff's part precludes it from enforcing the alleged agreement.

(e) As hereafter stated more at length, plaintiff by its gross negligence permitted United to engage in a kiting operation which caused the loss involved in this litigation which either plaintiff or defendant must bear; this negligence on plaintiff's

part precludes it from enforcing the alleged agreement.

(f) And finally the evidence shows without dispute that at the very time the alleged agreement was made plaintiff was refusing to pay said checks for \$97,207.00; that when plaintiff was discussing the alleged agreement with defendant, plaintiff knew that its rejection of these checks would create a large overdraft in the Lofendo account and that defendant was dealing with it upon the assumption that no such overdraft existed; but that plaintiff did not advise defendant at that time that it was rejecting such checks for \$97,207.00. This inequitable conduct of plaintiff precludes it from enforcing the alleged agreement.

VI. Points in Support of Defendant's Contention That Plaintiff Is Precluded by Its Own Negligence and Misrepresentation From Recovering Payment of the Four and the Six Checks

1. The record shows without dispute that in November, 1948, and for several months prior thereto, United was engaged in what is known in banking circles as a kite; that in order to carry on this kite, United would draw a check upon the branch bearing Lofendo's signature and would deliver such check to plaintiff either to obtain credit in its commercial account or as a remittance on account of Lofendo's accounts receivable assigned by United to plaintiff; that when such checks were delivered as remittances, plaintiff upon receiving such checks would make an additional loan to

United, the proceeds of which would be credited to United's commercial account with plaintiff; and that as a result of this practice of plaintiff in making loans to United, United in effect received credit in its commercial account for the Lofendo checks delivered by it to plaintiff as remittances. The record also shows without dispute that when United would deliver Lofendo checks to plaintiff either as remittances or for credit in its commercial account, it would draw its own checks payable to Lofendo and endorse such checks in Lofendo's name and would cause such checks to be deposited to the account of Lofendo in the Lofendo account with the branch within such time so that when such checks of Lofendo drawn to the order of United were presented to the branch for payment, there would be funds to his credit in the branch to pay them; that one side of the kiting operation was the side in which checks of Lofendo drawn to the order of United were either deposited to the credit of United in its commercial account with plaintiff or delivered by United to plaintiff as remittances; and that the other side of the kiting operation was the side in which checks of United drawn to the order of Lofendo were deposited to the credit of Lofendo in the Lofendo account with the branch; and that in November of 1948, and for several months prior thereto there were many checks used on both sides of the kite. And finally the record shows without dispute that plaintiff was guilty of the grossest negligence in not having dis-

covered and put a stop to the kite long prior to the payment by it of the four and six checks.

The trial court made no findings with respect to defendant's claim that plaintiff was guilty of such negligence in not having discovered the kite. The only findings which the court made with respect to the point were that it was not true that any act of plaintiff in allowing United to incur obligations of any kind to it or anything else ever done or omitted by plaintiff in any way proximately caused or contributed to any loss sustained by defendant in any amount and that it is not true that defendant, or plaintiff, or anyone else has ever suffered any loss by reason of the six checks since defendant paid out no funds and did no act in any way to its detriment in reliance on the six checks.

But plaintiff's negligence in not having discovered and put a stop to the kite did proximately cause the loss which either plaintiff or defendant shall suffer because of the payment of the four checks and the six checks and the trial court's findings to the contrary are not supported by any evidence and are clearly erroneous. As such negligence of plaintiff proximately caused such loss plaintiff is precluded from recovering these payments from defendant.

2. The trial court erred in not finding the facts with respect to plaintiff's negligence in not having discovered and put a stop to the kite. (These facts are stated in paragraphs XIII to and including XXX of the findings of fact proposed by de-

fendant; reference is hereby made to these paragraphs of these proposed findings for a statement of these facts.)

3. Although the trial court made no findings with respect to the allegations of defendant's answer that plaintiff was guilty of negligence in not having discovered and put a stop to the kite, it did find that as early as October 22nd, 1948, defendant became suspicious that the Lofendo account was being operated as part of a check kiting operation; that on that day defendant gave instructions to its employees that thereafter they were not to accept for immediate credit any checks drawn by United to the order of Lofendo but were to accept such checks for collection only and were not to permit Lofendo to draw against any items until such checks were so collected; that defendant did not fully observe these instructions until November 10th; that on November 10th defendant became positive that the transactions going on between Lofendo and United were not ethical but were part of some dishonest scheme; that on that day defendant reiterated imperative instructions that no checks of United drawn to the order of Lofendo and tendered to defendant for deposit were to be accepted for credit and were to be accepted for collection only and that no withdrawals of any items were to be made until said collection.

The findings of the trial court that on October 22nd, 1948, or thereabouts, defendant became suspicious that the Lofendo account was being operated as a check kiting operation are clearly erroneous.

As stated, the checks being deposited in the Lofendo account were checks drawn by United on plaintiff. The record shows without dispute that on or about October 20th the branch made inquiry of plaintiff respecting United's account with plaintiff and its standing and financial position; and that plaintiff in response misrepresented to the branch United's position and financial standing; and that the branch in thereafter handling the Lofendo account relied upon these representations. The record also shows without dispute that on or about October 20th the branch made other inquiries with respect to the account, and that plaintiff's representations plus the result of such other inquiries satisfied it that there was nothing wrong in the account. And the findings that on November 10th defendant became positive that transactions going on between Lofendo and United were not ethical and were part of a dishonest scheme are likewise clearly erroneous. The record shows without dispute that the branch did not begin to suspect that a kiting operation might be going on until around November 13th or 14th when there were no funds in the Lofendo account to pay checks drawn upon it. And the record shows without dispute that the other findings of the trial court set forth in the next preceding paragraph are misleading half truths and that the state of affairs at the branch was entirely different from that suggested by these findings.

4. But if it be assumed for argument's sake that defendant was negligent in failing to discover

the kite, plaintiff is nevertheless precluded from recovering its payment of the four and six checks (i) because plaintiff's negligence in having failed to discover the kite proximately contributed to the damage of which it is complaining and therefore it cannot under the law recover and (ii) because of the following: Neither plaintiff nor defendant were participating in United's fraud and they were both innocent of that fraud; but the record shows without dispute that plaintiff's negligence was the primary cause of the loss which must be sustained by either one of these banks; and so under the law plaintiff must sustain this loss.

5. The trial court found that it is not true that plaintiff ever made any representation to defendant to induce it to pay any checks drawn on the Lofendo account to the order of United or to induce defendant to give any one credit for any checks drawn by United on plaintiff payable to Lofendo; and that it is not true that in reliance on any representations of plaintiff defendant ever paid any checks drawn on the Lofendo account or ever gave the Lofendo account credit for checks of United. The record shows without dispute that this finding is clearly erroneous and that plaintiff made the misrepresentations to defendant already mentioned with respect to United's account with plaintiff and its financial position and standing in order to induce defendant to pay checks drawn on the Lofendo account to the order of United and to induce defendant to give credit for checks drawn by United on plaintiff payable to Lofendo; that defendant

relied upon such representations and that such representations were fraudulent, because even if plaintiff did not actually know they were false plaintiff made them without reasonable ground for believing them to be true.

VII. Point in Conclusion.

The trial court's finding that defendant is indebted to plaintiff in the amounts specified in paragraph XXX of the findings is for the reasons indicated by these points clearly erroneous.

Dated July 31st, 1951.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &
TULLEY,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 31, 1951.

[Title of Court of Appeals and Cause.]

Application That Exhibits May Be Considered in
Their Original Form and Need Not Be Printed

Bank of America National Trust and Savings
Association, the defendant and the appellant in the
above-entitled action, alleges as follows:

That upon the trial of the above-entitled action
the plaintiff introduced exhibits which were numbered
Exhibit 1 to and including 34, and the defendant introduced exhibits which were lettered A
to and including Exhibit YY; that said action involved a controversy between your appellant and Merchandise National Bank, plaintiff and appellee; that several of said exhibits designated either by one letter or one number consisted of not one paper but large groups of papers; that many of said exhibits consisted of cancelled checks, deposit tags, ledger sheets, remittance sheets, bookkeeping records, and similar documents; that it would be difficult and most expensive to reproduce exhibits of the sort just described in the printed record to be used on this appeal; that appellant intends to designate as part of such record certain stipulations of fact which were marked as exhibits and certain important letters and telegrams which were marked as exhibits; that it will not cause this Court any inconvenience in considering this appeal to consider the other of said exhibits in their original form because most of the facts established thereby are either stipulated to or undisputed and

so such facts can be stated in the briefs of either of the parties and will not be challenged by the other with the result that reference to said other exhibits will for the most part be unnecessary on the appeal; that it may be necessary for this Court on the appeal to examine a few of said other exhibits (those not to be included in the printed record if this application is granted) for the purpose of determining its form and general character, but in such cases it will be, in our opinion, more advantageous for this Court to examine the exhibit itself than to examine a printed reproduction of it.

Wherefore, appellant prays for an order that on this appeal the exhibits shall be considered in their original form instead of reproducing them in the printed record, except that either party to said appeal may designate as part of the printed record any exhibit which it deems material to the consideration of the appeal.

Dated July 31, 1951.

/s/ S. B. STEWART, JR.,

/s/ G. D. SCHILLING,

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &
TULLY,

Attorneys for Defendant and
Appellant.

It is hereby stipulated that the foregoing application may be granted provided, however, if appellee designates any exhibit or exhibits for printing in the record, its right to costs with respect to the expense of printing said exhibits shall be determined as if the foregoing application had not been granted, so that if appellee becomes entitled to its costs on this appeal its right thereto shall not be prejudiced by this stipulation or the order entered thereon.

/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON,

/s/ THOMAS P. RIORDAN,

Attorneys for Plaintiff and
Appellee.

So Ordered.

/s/ WILLIAM DENMAN,

/s/ WILLIAM HEALY,

/s/ WM. E. ORR,

Judges U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed August 2, 1951.

